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No.

In The

Supreme Court of the United States

October Term, 1993

NDUCHE CHIMA UWAEZHOKE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court erred in finding a racially-neutral and non-pretextual explanation where the Prosecutor's stated rationale for striking one of only two potential black venire persons was that the juror "is a single parent... that rents...[and] may be involved in a drug situation where she lives", in circumstances where the prosecutor was aware that the potential juror was employed by the postal service with four years seniority and had an unblemished record of law-abiding behavior.

2. Whether the Third Circuit was correct in rejecting the view of the Ninth Circuit that a nexus between the particular juror and the facts of the case must exist in order for the prosecutor's explanation of a propose challenge to be facially valid?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	v
Opinion Below	1
Jurisdiction	2
Constitutional Statutory And Rule Provisions Involved	2
Statement Of The Case	2
I. Introduction	2
a. The Question At Issue	2
b. The Third Circuit's Analysis	4
II. Factual Background	5
A. Jury Selection	6
B. The United States' Proofs	8
i.The Arrest and Interrogation of Tony Butts	8
ii.The Substance Of The Monitored Telephonic Communications	11

Page

iii. The Controlled Delivery To Chicago..... 13

iv. The Testimony of Tony Butts..... 14

a. Direct Examination..... 14

b . Cross Examination..... 19

ve.The Arrest of Petitioner And Search Of His Domicile..... 24

Reasons For Granting The Writ..... 26

Point I. Certiorari Must Be Granted To Facilitate A Clear Statement By This Court As To The Interpretative Criteria Regardin Analysis Of Alleged Racially-Neutral Explanations For The Exercise Of Peremptory Challenges.....27

I. Applicable Law..... 31

A. The Rulings of This Court..... 31

i. Batson v. Kentucky..... 31

ii. Holland v. Illinois..... 36

iii. Powers v. Ohio..... 39

iv. Hernandez v. New York..... 41

B. The Opinion Herein And Other Third Circuit Precedent..... 43

i. Jones v. Ryan..... 44

Page

ii. United States v. Uwaezhoke..... 50

a. The Majority Opinion..... 50

b. The Dissent..... 53

II. Certiorari Must Be Granted To Correct The Violation Of Petitioner's Rights..... 57

ii. Available Precedent Outside The Third Circuit Supports Position That A Reversal Is.....58

Point II Certiorari Should Be Granted To Resolve The Dispute Between The Third And Ninth Circuits As To Whether Hernandez Requires A Nexus Between The Particular Juror And The Facts Of The Case.....62

Conclusion.....62

TABLE OF CITATIONS

Cases Cited: *Page*

Alvarado v. United States,____U.S.____, 111 L.Ed 2d 439 (1991)..... 39

Avery v. Georgia, 345 U.S. 559 (1953)..... 34

Batson v. Kentucky, 436 U.S. 79 (1986).....31

Batson v. Kentucky, 476 U.S. 79 (1986).....3

Cunnigham v. Zant, 928 F.2d 1006 (11 Cir. 1991).....60

Hernandez v. New York,___U.S.___,111 S.Ct. 1859, 1864 (1991)..... 41

Holland v. Illinois,____U.S.____, 107 L.Ed 2d 905 (1991).....53

Jones v. Ryan, 987 F.2d 960 (3 Cir. 1993).....4

Martin v. Texas, 200 U.S. 316 (1906).....33

Murchu v. United States, 926 F.2d 50 (1 Cir. 1991).....60

Norris v. Alabama, 294 U.S. 587 (1935).....33

Powers v. Ohio,___U.S.___111 S.Ct 1364 (1991).....39

Stauder v. West Virginia, 100 U.S. 303 (1880).....33

Swain v. Alabama, 380 U.S. 202 (1965).....32

Page

Taylor v. Louisiana, 419 U.S. 522 (1975).....37

Teague v. Lane,____U.S.____, 103 L.Ed 2d 334 (1991)...39

United States v. Horsley, 864 F.2d 1543 (11 Cir. 1989)..61

United States v. Alston 895 F.2d 1362, 1367 (11 Cir. 1990).....59

United States v. Bennett, 923 F.2d 1543, 1551 (11 Cir. 1991) 59

United States v. Bishop, 959 F.2d 820, 825 (9 Cir. 1992)..... 62

United States v. Guerra-Marez, 928 F.2d 665, 673 (5 Cir.....59

United States v. Joe, 928 F.2d 99 (4 Cir. 1991)..... 59

United States v. Uwaezhoke, 995 F.2d 388 (3 Cir. 1992)...1

United States v. Uwaezhoke, 995 F.2d 388 (3 Cir. 1993)...5

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

NDUCHE CHIMA UWAEZHOKE, PETITIONER

-vs-

UNITED STATES OF AMERICA

PETITION FOR A WRITE OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

Petitioner prays that a writ of certiorari issue to review the judgments of the Third Circuit entered in this proceeding on May 6, 1993 and June 11, 1992.

OPINION BELOW

The Order of the Third Circuit Court of Appeals is appended to this petition. The opinion of that Court is reprinted as **United States v. Uwaezhoke, 995 F.2d 388 (3 Cir. 1992).** The order of The Third Circuit denying a rehearing is also appended to this petition.

JURISDICTION

This jurisdiction of the Supreme Court to review the Final Judgment of the Third Circuit Court of Appeals is based on **28 U.S.C. §1254(1).**

CONSTITUTIONAL STATUTORY AND RULE PROVISIONS INVOLVED

Petitioner seeks review of issues of law arising under the Sixth and Fourteenth Amendments to the United States Constitution.

Statement Of The Case

I.

Introduction

a. The Question At Issue

The instant matter presents this Court with an issue of great public and juridical importance with respect the law relative to review of district court determinations as to the "racially neutral" character of peremptory challenges exercised by the United States. The prosecutor herein exercised a peremptory challenge to strike one of only two potential African-American jurors. Petitioner, who is black,

challenged the exercise as race-based. The district court below required that the prosecutor proffer a "racially neutral" rationale. The prosecutor falsely stated that his office enforced a policy of striking postal workers. Indeed, when the existence of such a policy was challenged by defense counsel, the prosecutor admitted the falsity of that utterance. Another prosecutor present thereafter provided a second proffer wherein he stated that the black juror was struck because she is a single parent, who rents an apartment and is "probably involved in a drug situation where she lives."

We submitted to the district court and thereafter to the Third Circuit Court of Appeals that **Batson v. Kentucky, 476 U.S. 79 (1986)**, clearly governs this situation and mandates reversal of the convictions herein. The United States not only failed to state a "racially-neutral" reason; it proffered a clearly bigoted rationale. The final proposition set forth by the United States, in effect, proved the impermissible stereotypic thinking which underpinned the peremptory challenge. Simply stated, the actual reason for the challenge was the prosecutor's constitutionally impermissible stereotype that "black jurors as a group will be unable impartially

to consider the [government's] case against a black defendant." **Batson v. Kentucky, supra at 89.**

Because he was unable to admit to this stereo-type on the record, the prosecutor in fashioning a pre-textual rationale unwittingly revealed an invidious form of bigoted analysis. He stated that the juror was struck because she was probably "involved in a drug situation where she lives." That observation was completely unfounded and at odds with the juror's background as a trusted postal worker, who had no history of non-law abiding behavior. It, in effect, stated the prosecutor's view that black people are prone to involvement with drugs.

b. **The Third Circuit's Analysis**

Contemporaneous with disposition of this matter, a second panel of the Third Circuit was considering an identical issue in **Jones v. Ryan, 987 F.2d 960 (3 Cir. 1993).** The **Jones** panel issued an opinion approximately two months prior to the decision in the instant matter. The tenor of the two opinions are starkly contrasted. The **Jones** Court reversed a district court determination admonishing courts that "if tension exists between the old tradition of

unconsidered preference for unfettered use of peremptory challenges and the still relatively young tradition of meaningful safeguards against invidious application of racial stereo-types, then the latter consideration must prevail." **Jones v. Ryan, supra at 968.**

The decision herein is in opposition to the principle articulated in **Jones** that the "[too high] price [of the old tradition] would be the jeopardizing of the integrity of the judicial process and stigmatization of venire persons of color". **Jones v. Ryan, supra, at 968**. The divided panel in the instant matter ruled that a prosecutorial explanation "[which] would be likely to have a disparate impact on blacks in the vicinage [need only] be scrutinized with care". **United States v. Uwaezhoke, 995 F.2d 388 (3 Cir. 1993).** More importantly, the panel left a clearly racist explanation undisturbed. The failure of the **Uwaezhoke** panel to perceive the clearly pretextual nature of the explanation indicated a lugubrious lack of insight and/or commitment to prevention of race-based exercise of peremptories.

II.

Factual Background

A. Jury Selection

On February 4, 1991, the jury selection process commenced herein. An issue arose respecting the constitutional propriety of the United States' decision to excuse one of only two potential African-American jurors. Petitioner is black and a native of Nigeria. Counsel objected to the challenge and reasoned that the juror was excused by the United States on purely racial grounds. Simply put, counsel asserted that the United States with a race-based motivation sought to deny a qualified African-American an opportunity to sit on the jury.

The court clearly perceived that the United States' motivations were potentially racial in nature. In this context, the court requested that the United States articulate "the basis for the challenge." In response, AUSA Jason Tannenbaum provided a patently fabricated rationale. He stated:

> We challenged her because its a general policy. She was a postal employee, and we usually just generally don't like to have postal employees on the jury. It has nothing to do with [anything] racial. (emphasis added).

The existence of a general policy as to use of peremptory challenges to excuse postal workers was immediately disputed by defense counsel. Counsel's challenge to the actual existence of such a policy elicited a disclaimer from both of the Assistant United States Attorneys present. In view of the inconsistency between AUSA Tannenbaum's articulation of a policy and his subsequent disclaimer of it, the court pressed the United States for an acceptable and firm rationale for exercise of the challenge. AUSA Bruce Repetto, as opposed to Tannenbaum, replied to the court's second request. He stated:

> This particular juror is employed by the postal service. There is a problem with postal service jurors in these kinds of cases. It is a person that is a single parent, it's also a person that rents, it's a person that may be involved in a drug situation where she lives.

The district court thereafter tersely stated "I'm going to accept the government's (second) explanation." Defense counsel replied "I want to go on the record objecting and asking for a mistrial based upon a deliberate use of a

prejudiced and racial challenge." The district court concluded the exchange by stating "[the rationale] was expanded upon by Mr. Repetto...Motion denied."

B. The United States' Proofs

i. **The Arrest and Interrogation of Tony Butts**

James Sullivan is employed as a United States Customs agent. On July 29, 1990 he participated in the arrest of Tony Butts at Newark International Airport. Butts was arrested in possession of a substantial amount of heroin. He was en route to Chicago, Illinois. Sullivan and other agents interrogated Butts for several hours. The agents' persistence resulted in Butts' agreement to participate in a consensually monitored telephone communication to Chicago.

It should be emphasized that Butts' agreement to cooperate followed many hours of intense interrogation and admonitions that it would "be in [his] best interest [to] deliver someone." Butts was arrested at approximately 5:35 p.m. on July 29. Telephonic attempts to contact Butts'

alleged connection in Chicago commenced approximately four hours later at 9:00 p.m. With reference to the initial calls, Butts advised Sullivan that "he was going to place a telephone call to Chicago, to the number that he had to deliver the heroin." The number utilized by Butts on July 29 did not relate to a telephone installation within petitioner's residence. And, Butts did not identify the person "to whom he was to deliver [the heroin] at that number." He claimed that "he didn't know the name." Butts nonetheless "[insisted] this is the place where he's to deliver the drugs." Four calls were made to the number prior to termination of the effort at midnight. Butts was thereafter lodged overnight in facilities provided by the Port Authority.

The agents resumed their interrogation of Butts of July 30. Indeed, he was awakened at 8:00 a.m. for this purpose. Butts stated to the agents that he dialed an incorrect number on the night of July 29, as part of a specific effort to deceive. Butts explained to Sullivan that "he was scared. He had never been in this type of position before.

He really didn't know what to do, what he should do."[1] Subsequent to his admission of deception, Butts "indicated that he had this second number." However, he again refused to identify the individual whom he expected to contact.

At approximately 11:00 a.m. on July 30, Butts established telephonic contact with petitioner at his [petitioner's] residence." He did not refer to petitioner by any name during the two separate conversations. Prior to placing the call, Butts expressed concern that the person whom he expected to answer the telephone "was going to know that he had been arrested." This alleged concern stemmed from the fact that "the call was supposed to be made on July 29, as soon as [Butts] exited the customs area." Special Agent Peter J. Fox provided Butts with an explanation for use in structuring the telephone conversation. Fox stated:

> I told him to say that there was a fire in Chicago on [July 29], that the

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1 Butts had also previously advised the agents that "the ultimate destination for the heroin was a hotel in Chicago to another party." He retrenched on that position and shifted to another story. Similarly, he at one point claimed to have transported the heroin for a fee of $20,000 and thereafter modified that claim to $10,000. On cross-examination, Butts testified that "when they told me what the stuff [was] worth, I just told them I was getting $20,000".

terminals at the airport had been knocked out because of this fire,' and that is why he could not get his ticket [July 29] and that's why he was calling on [July 30].

ii. **The Substance Of The Monitored Telephonic Communications**

As was previously noted, Butts spoke to petitioner twice on the morning of July 30. During the first conversation, Butts advised petitioner that he lodged the previous evening at his cousin's residence in Newark because "[there] wasn't no ticket [at the airport] waiting for him." Petitioner assured Butts that a ticket was reserved and awaiting his arrival. The conversation concluded with Butts' representation that he was returning to the airport to secure the ticket and would "call...back when he [arrived] there." There is no clear reference to narcotics within the conversation. The singular ambiguous reference is to "Bobby" being afraid and desiring "to come back without nothing". The transcript states **inter alia**:

Petitioner: Yeah, you know I
you know, you
know you

	get all scared now Bobby wants to come back without nothin' , you know what I mean?
Butts:	Yeah.
Petitioner:	I have to call him and let him know because he has to leave in less than six hours.
Butts:	Oh, okay.
Petitioner:	He's going to be upset, you know what I mean?
Butts:	Uh, huh.
Petitioner:	So when are you getting here.
Butts:	Uh, I go I can get over there now t then.
Petitioner:	You going over there right now.
Butts:	I call you back when I get there to the airport.
Petitioner:	Call me when you get to the airport.

Consistent with the false pretense of having to travel to the airport from a residence in Newark, Butts waited a period of time prior to re-establishing contact with petitioner. He thereafter contacted petitioner and utilized the ruse provided to him by Fox that a fire caused a computer outage, resulting in his inability to secure his ticket. The conversation concluded with petitioner's agreement to meet Butts at the Chicago Airport. This second conversation was also devoid of any specific reference to narcotics.

iii. The Controlled Delivery To Chicago

Subsequent to the telephone conversations with petitioner, Butts agreed "to participate in a controlled delivery of the heroin [to Chicago]." To facilitate his plan, Fox accompanied Butts to the American Airlines counter "where a new ticket was issued in Butts' name." In further preparation for the controlled delivery, "the majority of the heroin [was confiscated] and a representative sample [was] placed in the original suitcase."[2] Thereafter, the controlled delivery scheme was set in full motion. Fox testified:

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2 The suitcase originally contained "[1,993] grams of a mixture containing heroin. [That] heroin mixture is 87 percent pure."

> The suitcase [containing heroin] was checked in. I was given a receipt. On the phone I handed that receipt to Tony Butts so he could retrieve the suitcase at the Chicago airport... That suitcase contains a false compartment.

Both Fox and Special Agent Alvin Sims accompanied Butts to Chicago. Butts at no time identified or meaningfully described the individual whom he expected to meet in Chicago. Fox testified that Butts disclosed "on the aircraft [that] it would be a Nigerian male."

Prior to their departure from Newark, the authorities in Chicago were alerted. It was intended that Chicago agents would effect the arrest of the individual who met Butts at the airport. Agents Fox and Sims ceased their participation in the investigation subsequent to Butts' meeting with petitioner and procurement of the suitcase from baggage claim. Fox testified that "[Butts] looked over towards me and then made a motion toward the person that he was standing with and he gave me a nod." Fox stated further:

> I looked over my shoulder and I noticed [petitioner] meet with Tony

> Butts, and at that time we proceeded over to the luggage carousel... I observed Tony Butts retrieve the suitcase from the luggage carousel, and when they walked towards the elevator leading to the parking lot I noticed the other individual looking over his shoulder... I broke off surveillance at that time.

iv. The Testimony of Tony Butts

a. Direct Examination

On direct-examination, Butts testified very succinctly and pointedly. The clarity and inculpatory nature of his direct testimony stands in stark contrast to Butts' statements on cross. On direct, with reference to both his and petitioner's culpability for the offenses at issue, Butts stated:

> [I was arrested] for importing heroin into the United States... [The heroin] was in my luggage. [I came from Singapore... I was headed to Chicago [to] deliver the suitcase to [petitioner].

As to his purposeful efforts to mislead the customs agents subsequent to his arrest, Butts testified "I was just scared because it was my first time being arrested and I was protecting the people who I was working for." Butts

asserted "that night I was protecting [petitioner], Bobby Foster, Patrice Foster and my sister Sheila."

Butts stated that the initial phone number which he provided to the agents related to the residence of "[petitioner's] girlfriend Sonnie." Butts claimed that "Bobby Foster gave me instructions if I couldn't reach [petitioner] at home, call that number there." Butts did not utilize petitioner's residence number initially "because [he] was still protecting him. I wasn't really cooperating." Butts admitted that he did not advise authorities of the participation of Bobby Foster and Patrice Foster in the scheme until "later, later, later afterwards when I was arrested, when I was doing the time."

Foster and Foster alone initiated Butts' involvement in the scheme. Butts stated that "about the first week in July Bobby Foster called me and told me to check on some fares to Singapore." Thereafter, activities commenced with reference to the trip to Singapore. We emphasize that all of the arrangement were made by Foster and Butts.

On the Friday evening prior to his planned departure, Butts had an accident and was hospitalized "the whole

weekend until Monday, [July 23]." Butts testified that Bobby Foster, petitioner, Sonnie and Patrice Foster visited him in the hospital. Bobby Foster allegedly inquired whether "[Butts] was going to be able to go on the trip." Butts apparently responded in the affirmative. Foster met Butts at the hospital immediately after his discharge. Butts testified that "[Foster] said if I could [travel] we will leave for [Singapore] tomorrow, that Tuesday morning."

Thereafter, Butts and Foster left as planned. According to Butts, Foster informed him at the hotel in Singapore that he intended to contact "Sonny". Thereafter, Foster engaged in a telephone conversation with an individual whom he referred to as "Sonny." Foster described "Sonny" to Butts as being petitioner's brother. The individual identified to Butts as "Sonny" subsequently arrived at the hotel. "Sonny" and Foster allegedly transacted an exchange of money at that juncture. Butts testified:

> We was introduced and Bobby went to his suitcase, luggage, and gave Sonny a package...[Sonny] took the carbon paper off [and] the rubber band and put everything in

> the garbage and he had money in his hand...[Sonny] asked Bobby did he have any extra spending money. If he didn't [he] would have to call [petitioner] and have some money wired down.

Butts next saw Foster and "Sonny" on the following day. Butts was allegedly advised by Bobby Foster that "he had talked to [petitioner]". According to Butts, Bobby Foster stated that petitioner informed him (Foster) that Patrice Foster "might [be traveling] to Singapore, but [Foster] didn't know for sure." At a later point that day, "[Foster] told [Butts] that he had to pick up Patrice at 12 midnight because she was coming down." This conversation concluded Butt's contact with Foster on that day.

"On Friday, about noontime, Sonny and his friend brought two suitcases over to the hotel." Butts was informed that "heroin [was] in the compartment of the suitcase." Butts testified:

> Bobby Foster laid the suitcase on the bed, and Bobby was examining the suitcase...At that point he told me it was heroin in the compartment of the suitcase...[Sonny] told Bobby that this suitcase go first and then the

> other suitcase go next, and then Bobby and Sonny took one of the suitcases up to Patrice Foster's room.

"[O]n Saturday...Patrice [Foster] left Singapore." Butts spent the day with Sonny and Bobby Foster. Butts was scheduled to leave on Sunday. Foster allegedly provided him with certain instructions. Butts stated:

> On Sunday, on the way to the airport, Bobby told me that [petitioner] will pay me, give me my money when I get to Chicago, and to call [petitioner] when I get to Tokyo...he just said to call [petitioner] when I get to Tokyo and check to see where my ticket was...[I was] to deliver the suitcase to [petitioner]...I tried to call [petitioner] when I got to Tokyo and I didn't get any contact with him, you know, so I came back to Newark and I was arrested.

b. Cross Examination

Cross-examination commenced with Butts' acknowledgment that he provided "many different statements...to the authorities about this business at Newark Airport and Tokyo and Singapore...several times [and] each one different." Butts' alleged primary purpose for

misleading authorities was to protect Bobby Foster who was intimately involved with Butts' sister (Sheila) and had fathered her child. Indeed, the "[final] story that Butts [testified to in court]" was not conveyed to authorities until a "few days" prior to trial. Prior to trial, Butts admittedly "lied continuously."

In this context, the United States failed to adduce in its direct examination that Butts initially advised authorities that an individual identified as "Carl" made all of the Singapore arrangements.[3] Butts claimed to have met Carl in a nightclub. Butts further stated to authorities that the ultimate destination of the heroin was "a hotel in Chicago to another party." As to his having made this latter false statement, Butts had a failure of recollection at trial.

Butts on cross-examination conceded that the funds wired to Foster in Atlanta allegedly by petitioner's girlfriend "could well have been [money] to buy Sheila a car" as opposed to funds related to the Singapore trip. The probability that the funds were for a purpose other than

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[3] Butts unequivocally denied that he at any time stated to authorities that petitioner "made arrangements to pick up heroin in Singapore." He stated that inclusion of such information in an agent's report was in error.

financing the Singapore trip is bolstered by the fact that Butts and Foster "bought the [Singapore] tickets before the money ever came." So too, on cross-examination Butts conceded that "[petitioner] never discussed anything with [him] about drugs."

In one of his several prior statements to the authorities, Butts claimed that he was provided a phone number in Singapore which he used to arrange the delivery of heroin to himself. That story excluded any mention of Bobby Foster and/or Sonny. Specifically, contrary to the account of his receipt of the heroin testified to at trial, Butts previously stated "he called [a] telephone number and arranged to have the suitcase picked up and returned with the heroin in it while he was out of the room [because] he did not want to see who delivered the heroin to his room and did not want them to see him." Butts' testified that his decision to cooperate evolved from the agents' admonition to him "that [he] was looking at ten to life and [should not] lie to [them]."[4] Notwithstanding that admonition, Butts "[was]

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4 It is noteworthy that Butts was placed on bail pending his testimony in petitioner's trial and disposition of his own charges.

lying all along... [and] telling [the agents] all along that the lies were the truth."

Butts' decision to lie about the amount of his alleged compensation for participation in the scheme prompted a series of questions as to the motive for such a lie. There was no "difference between getting $10,000 and $20,000." Butts stated "It was just a lie." That answer precipitated the following exchange:

Counsel:	Do you often lie without any point, just lie?
Butts:	I lie.
Counsel:	And in this particular case you lied with no point at all, just lied.
Butts:	I just lied.
Counsel:	No reason, just lied?
Butts:	No reason, just lied.

Butts also revealed on cross-examination that Bobby Foster shared an apartment with petitioner in Chicago. Accordingly, the telephone number which Butts utilized to

contact petitioner was also the domicile of Bobby Foster. Butts "used to call [Foster] at that number."

The most critical aspect of Butts' testimony on cross-examination was his disclosure that Bobby Foster told him (Butts) in Singapore that he (Foster) was going to purchase [jewels] for [petitioner] to bring back because they were cheap." Foster thereafter advised Butts that "he [did not have] the money to [purchase jewels for petitioner]." This disclosure was critical because it explained petitioner's comments to Butts in the first telephone conversation. In that conversation, petitioner stated to Butts "Yeah, you know I you know, you know you get all scared now Bobby wants to come back without nothing, you know what I mean."

Petitioner's comment was interpreted on direct examination as indicating petitioner's awareness that Butts and Foster were transporting heroin from Singapore. With respect to that passage within the conversation, Butts conceded on cross-examination that petitioner could well have been referring to jewels. In this context, Butts iterated that petitioner did not make any reference to drugs either "in

[the] conversation in Newark or when [Butts] got to Chicago." And, "from start to finish, from Newark to Chicago, right up to [the arrest], Butts never told the [agents that petitioner] was the guy... [or that] he had anything to do with drugs." Petitioner was implicated only after he appeared at the airport.

v. The Arrest of Petitioner And Search Of His Domicile

Carol Czech is employed by the United States Customs Service in Chicago. She was assigned to participate in apprehension of whomever met Tony Butts at the Chicago airport. Czech and agent Anthony Macisco essentially effect the arrest. Czech stated:

> [We] met agent Fox as he exited an American Airlines Flight. I turned around to observe a subject fitting the description of Tony Butts meet with a subject who was later identified as [petitioner]... Then the defendant and Butts got on the elevator, myself and Mr. Macisco and two other agents are also in the elevator, the six of us on the elevator at that point...I observed Butts and [petitioner] go to a Blue Toyota. The defendant opened the hatch of the Toyota. Then Butts went around to the passenger side,

> the defendant to the driver's side, and at that time Mr. Macisco and myself arrested the defendant.

Subsequent to the arrest, petitioner and Butts were separated. Agent Macisco assumed custody of petitioner. Macisco requested and received petitioner's consent to search his residence. Petitioner stated to Macisco "come on in, I have nothing to hide." Petitioner allegedly requested that the handcuffs [be] removed and that the number of agents [be limited]." The agents agreed and when "[they] got to [petitioner's] apartment the handcuffs [were removed]." Petitioner resided in "a small one-bedroom apartment overlooking Lake Michigan. During the course of the search, the agents found a scale; box of baggies; some mobile phones and a digital pager; $50,400 in United States currency, and a suitcase with a false bottom in it. Petitioner also led the agents to .25 caliber automatic pistol, immediately upon entering the premises. The above items were admitted into evidence by the United States.

On cross-examination, defense counsel elicited that the agents also found "two W-2 forms made out in the name of [petitioner], one for 1988 and the other for 1989." The

forms indicated that petitioner was employed by the "Mandela Beauty Salon for both years." Defense counsel also adduced that the money was found in different envelopes in a briefcase. For example, $12,000 was found in a white envelope with a "First Commerce Bank of Chicago" marking. Another $14,000 was found in an envelope marked "Uptown National Bank of Chicago." Macisco also admitted that petitioner informed him that the money was "'used in his cosmetics business." Moreover, Macisco testified that all of the items seized from petitioner's residence could be used for lawful purposes. Indeed, Macisco stated that "there [is no] proof that [any of] these items have been used in connection with the drug trade."[5]

Based on the foregoing evidence, the jury convicted petitioner of each of the offenses set forth in the indictment. The Third Circuit affirmed. This Petition follows.

Reasons For Granting The Writ

Point I

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5 Defense counsel also adduced evidence that mail was forwarded to petitioner's residence in the name of Andrew Ukaegbo. That apparently is Bobby Foster's legal name.

Certiorari Must Be Granted To Facilitate A Clear Statement By This Court As To The Interpretative Criteria Regarding Analysis Of Alleged Racially-Neutral Explanations For The Exercise Of Peremptory Challenges

Petitioner was indicted in the District of New Jersey and charged with various offenses related to narcotics trafficking. Petitioner is black and a native of Nigeria. At the time of trial herein, he was a legal resident of the United States domiciled in Chicago. During the jury selection process despite the relatively high racial heterogeneity associated with the New Jersey vicinage, only two African-Americans were seated on the petit jury venire as potential jurors. The United States exercised a peremptory challenge to excuse one of the only two African-American potential jurors. Defense counsel challenged the United States' exercise of a peremptory to strike her as being race-based.

The district court required that the United States articulate a non-racial basis for exercise of the challenge. The AUSA who exercised the challenge falsely stated that the United States Attorney in this federal district formulated

a policy for application in criminal trials which mandated peremptory challenge of postal workers. When pressed for the origin of this policy or proof of it, both prosecutors present disclaimed its existence. When provided yet another opportunity to propound an acceptable basis, the second AUSA present stated that the potential juror was challenged because of her status as a single parent and an individual who resides in a leased apartment. According to the AUSA, the latter attribute (apartment lessee) rendered it likely that the potential juror was involved "in a drug situation where she lives."

We submit that it cannot in good conscience be gainsaid that the United States' peremptory challenge to the potential African-American juror was race-based. The AUSA who exercised the challenge uttered an obviously false rationale to the district court. As opposed of being startled and affronted by the obvious fabrication, the district court calmly provided the United States with an opportunity to concoct a more acceptable basis for purposes of protecting

the record.[6] That second opportunity in our view elicited clear proof of the race-based and bigoted nature of the challenge. Specifically, it reaped a plainly racist and negative characterization of the potential juror. The first prong of the negative characterization was predicated upon the fact that the potential juror was a single parent without financial means to own a home thereby requiring that she rent.

There is no comprehensible basis upon which the status of single parent and apartment lessee renders an individual unqualified as a juror, absent resort to prejudiced criteria based on bigoted moral or economic class distinctions. In this context, we stress that the most obvious proof of bigotry-motivated exercise of the peremptory challenge is not derived from the prosecutor's view that the juror was unqualified because she is a single parent and relatively impecunious. While reprehensible and unrelated to any recognized qualification, the first prong pales in comparison to the second-prong of the stated rationale. The unassailable proof of race-based motivation is

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6 The hesitance of courts to act when confronted with clear evidence of racial discrimination is a primary factor in perpetuation of racist practices. In refusing to recognize it, the court in effect countenanced it.

the prosecutor's unsubstantiated and absurd claim that the potential African-American juror was "likely involved in a drug situation where she lives." That observation is at odds with the potential juror's work history and the fact that she has no prior record of non-law abiding behavior.

This latter observation of the AUSA is predicated upon the most rank form of racially misguided stereotyping. He has assumed that a black single parent, who rents an apartment, is necessarily involved in a "drug situation" in their community. It cannot be seriously questioned that a Caucasian single parent, who rented an apartment, would not have been viewed in this fashion. In any event, without regard to the stated rationale, it is clear that the potential juror was challenged exclusively because of her race. Although it unwittingly provided clear evidence of bigoted thinking, the stated rationale was manufactured to conceal an obvious race-based exercise. The peremptory challenge herein was based on the prosecutor's misplaced view that the potential juror would favor the black defendant's case. Nothing in the juror's background indicated that she would be

unable to impartially consider the criminal liability of a black defendant.

This Court must grant certiorari to set forth a thorough and practical analysis of the circumstances at issue herein. It is respectfully submitted that honest and concerned review mandates granting of the writ and ultimate reversal of the convictions obtained herein in violation of the Sixth and Fourteenth Amendments. Due process and its protection both of the petitioner's rights and the dignity of potential African American jurors demands no lees than a resounding condemnation of the challenged conduct. Prior opinions of this Court have resulted in progress. Utilization of this case as an example will facilitate movement beyond progress to actual remedy.

I.

Applicable Law

A. The Rulings of This Court

i. Batson v. Kentucky

In **Batson v. Kentucky, 436 U.S. 79 (1986)**, this Court considered the claims of a black petitioner who

demonstrated that "the prosecutor [in his trial] used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected." The petitioner in **Batson** alleged that the "prosecutor's removal of the black venire men violated [his rights under the Sixth and Fourteenth Amendments] to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws." **476 U.S. at 83**. The Court in **Batson** commenced its analysis with a discussion of the opinion in **Swain** v. **Alabama, 380 U.S. 202 (1965).**

In **Swain**, this Court previously recognized that "purposeful or deliberate denial to [Blacks] n account of race of participation as jurors in the administration of justice violates the Equal Protection clause." **380 U.S. at 203-204.** The **Batson** Court stated:

> More than a century ago, the Court decided that the State denies a Black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded... That decision laid the foundation for the Court's unceasing efforts to eradicate racial-

> discrimination in the procedures used to select the venire from which individuals are drawn...Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure. [**476 U.S. at 85**]. (emphasis added)

In this context, it should be emphasized that "a defendant has no right to a petit jury composed in whole or in part of persons of his race" but he "does have the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria." **Batson v. Kentucky, supra at 85-86. Cf. Stauder v. West Virginia, 100 U.S. 303 (1880); Martin v. Texas, 200 U.S. 316 (1906)**. Simply stated, the United States may not exclude members of the defendant's race from the jury venire on account of race, or on the false assumption that members of the defendant's race are not qualified to serve as jurors. **Batson v. Kentucky, supra at 86. Cf. Norris v. Alabama, 294 U.S. 587 (1935).**

The **Batson** Court emphasized that the harm in a biased selection process extends both to the defendant and the racially-excluded juror. Therefore, the law recognizes that "by denying a person participation in jury service on

account of his race, the [United States] unconstitutionally discriminated against the excluded juror." **Batson v. Kentucky, supra at 87.** The **Batson** Court iterated a principle of long-standing that acceptance of racist practices within the administration of justice is particularly harmful. The Court in **Batson** stated:

> Discrimination within the judicial system is most pernicious because it is a stimulant to that race prejudice which is an impediment to securing black citizens that equal justice which the law aims to secure to all others." **[476 U.S. at 87-88].**

Based upon the legal precedent before it, the **Batson** court pronounced that "the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors." **476 U.S. at 88**. Therefore, the law "forbids discrimination on account of race in selection of the petit jury." **Id.** Accordingly, the United States may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at other stages in the selection process. **Id.** See, **Avery v. Georgia, 345 U.S. 559 (1953)**. Thus, a prosecutor's privilege to strike individual jurors through peremptory challenges is subject to

the commands of due process and equal protection. In short, due process and equal protection forbids the prosecutor to peremptorily challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the case against a black defendant. **Batson v. Kentucky, supra at 89.**

To facilitate meaningful challenge to race-based exercise of peremptory challenges, the **Batson** Court delineated clear criteria. The Court stated:

> A defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group...and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race...the defendant is entitled to rely on the fact...that peremptory challenges constitute a jury selection practice that permits those to discriminate...The defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that

> practice to exclude the venire men from the petit jury on account of their race...Once the defendant makes a **prima facie** showing, the burden shifts to the [United States] to come forward with a neutral explanation for challenging black jurors... The prosecutor therefore must articulate a neutral explanation related to the case to be tried. [**476 U.S. at 96-98**]. (emphasis added).

ii. Holland v. Illinois

In **Holland v. Illinois,____U.S.____, 107 L.Ed 2d 905 (1991)**, this Court considered two questions left unresolved in **Batson**. Those questions are (1) whether a white defendant has standing to raise a Sixth Amendment challenge to the prosecutor's exercise of peremptory challenges to exclude all black potential jurors from his petit jury, and (2) whether such exclusion violates his Sixth Amendment right to trial by an impartial jury. The **Holland** Court ruled that a white defendant does have standing to raise a Sixth Amendment challenge to exclusion of blacks from his jury. The Court in **Holland** stated "the Sixth Amendment entitles every defendant to object to a venire

that is not designed to represent a fair cross section of the community, whether or not the systematically excluded groups are groups to which he himself belongs." **107 L.Ed 2d supra at 914.** See, **Taylor v. Louisiana, 419 U.S. 522 (1975)** (A man has standing to challenge exclusion of women from the jury).

The problem identified by the Court in **Holland** is that the petitioner sought "an extension of the fair cross-section requirement from the venire to the petit jury." **107 L.Ed 2d supra at 914**. According to the **Holland** majority, the variation from venire to petit jury calls into question the scope of the Sixth amendment guarantee, not the defendant's standing to assert it. **Id.** The **Holland** Court rejected the proposition that a prosecutor's use of peremptory challenges to eliminate a distinctive group in the community deprives the defendant of a Sixth Amendment right to a fair possibility of a representative jury. **Id. at 915.** The **Holland** Court ruled that the Sixth Amendment is satisfied by "inclusion of all cognizable groups in the venire." **Id.** In this context, the **Holland** Court distinguished the Sixth Amendment claim before it from the equal protection right at issue in **Batson.**

Unlike the Sixth amendment, equal protection because of "[its] intransigent prohibition of racial discrimination applies both to the venire and petit jury." The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does). **Id. at 916.**

With respect to applicability of the Fourteenth Amendment claim ruled upon in **Batson**, the **Holland** Court stated "Race as such has nothing to do with the legal issue in this case." **Id. at 920**. The Court in **Holland** stated further:

> We do not hold that the systemative exclusion of blacks from the jury system through peremptory challenges is lawful; it obviously is not...we do not even hold that the exclusion of blacks through peremptory challenges in this particular trial was lawful. Nor do we even hold that this particular (white) defendant does not have a valid constitutional challenge to such racial exclusion. All we hold is that he does not have a valid constitutional challenge based on the Sixth Amendment-which no more forbids the prosecutor to

> strike jurors on the basis of race than it forbids him to strike them on the basis of innumerable other generalized characteristics. [107 **L.Ed 2d supra at 920-921**].

See, **Teague v. Lane,____U.S.____, 103 L.Ed 2d 334 (1991); Alvarado v. United States,____U.S.____, 111 L.Ed 2d 439 (1991).**

iii. Powers v. Ohio

Subsequent to its opinion in **Holland v. Illinois, supra**, this Court revisited the principles at issue therein in **Powers v. Ohio,___U.S.___111 S.Ct 1364 (1991).** The petitioner in **Powers**, a white man, objected in his trial when the prosecutor exercised his first peremptory challenge to remove a black venire person. The trial court over-ruled the objection. Unlike the petitioner in **Holland**, the petitioner in **Powers** relied upon the Fourteenth Amendment as opposed to the Sixth Amendment. In **Holland**, this Court ruled that "the Sixth Amendment did not restrict the exclusion of a racial group at the peremptory stage." **Powers v. Ohio supra at 1367.**

The State of Ohio argued in **Powers** that even under a Fourteenth Amendment analysis "the race of the objecting defendant constitutes a relevant pre-condition." **111 S.Ct. supra at 1368.** The **Powers** Court rejected that position. The Court stated:

> **Batson** was designed to serve multiple ends, only one of which was to protect individual defendants from discrimination in the selection of jurors...a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large...Jury service preserves the democratic element of the law, as it guards the rights of the parties and insures continued acceptance of the laws by all the people [**111 S.Ct. supra at 1368**]

Based upon this analysis, the **Powers** Court rejected "the view that race-based peremptory challenges survive equal protection scrutiny because members of a all races are subject to like treatment, which is to say that white jurors are subject to the same risk of peremptory challenges based on race as are all other jurors." **111 S.Ct. supra at 1370.** Accordingly, the **Powers** Court enunciated the principle that "race is irrelevant to a defendant's standing to object to the

discriminatory use of peremptory challenges." **111 S.Ct. supra at 1373**.

iv. Hernandez v. New York

In **Hernandez v. New York,___U.S.___,111 S.Ct. 1859, 1864 (1991)**, this Court granted certiorari to consider the claim of a Latino petitioner that "the prosecutor...exercised preemptory challenges to exclude Latinos from the jury by reason of their ethnicity. A New York State court found that no constitutional violation occurred. This Court framed the issue as a determination "whether the prosecutor offered a race-neutral basis for challenging Latino potential jurors." **Id.**

The reason for exercise of the challenges articulated by the prosecutor was that "[he felt] very uncertain that [the Latino potential jurors] would be able to listen and follow the interpreter." **Id.** The prosecutor stated further:

> I believe that in their heart they will try to follow it, but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses...I feel that in a case

> where the interpreter will be for the main witnesses, they would have an undue impact upon the jury. **[111 S.Ct. supra at 1864-1865].**

The **Hernandez** Court thereafter clarified the parameters of an acceptable "race neutral explanation" and the analysis to be undertaken by courts subsequent to the offering by the State of such an explanation. The Court in **Hernandez** stated:

> A neutral explanation ...here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. **[111 S.Ct. supra at 1866].**

Once the prosecutor offers a race-neutral basis for his exercise of preemptory challenges, the trial court then has the duty to determine if the defendant has established purposeful discrimination. In this context, the **Hernandez** Court stated that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts including the fact, if it is true, that the classification bears

more heavily on one race than another." **111 S.Ct. supra at 1868.** Stated somewhat differently, "if a prosecutor articulates a basis for preemptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination." **Id.**

B. The Opinion Herein And Other Third Circuit Precedent

The Third Circuit's opinions in **Jones v. Ryan, supra,** and the instant matter are analytically at odds. Accordingly, the need for guidance by this Court has resulted in an internal conflict within the Circuit. We stress that the panel herein was divided. The Honorable Louis H. Pollak, U.S.D.J., sitting by designation, dissented. Judge Pollak expressed a concern regarding explanations which "as unadorned verbal propositions [are] race-neutral" but nevertheless clearly invoke the specter of pretextuality. **United States v. Uwaezhoke, supra at 31**. The majority of the panel did not share Judge Pollak's concern and sensitivity.

It is highly probative that Judge Pollak cited **Jones** for the proposition that the majority did not appreciate that the issue "at bar [goes] to the core of **Batson** and hence [is] of great importance to the due administration of equal justice under law". A comparative analysis of the opinions in **Jones** and **Uwaezhoke** indicates that a clear confusion exists relative to the Third Circuit's position and standards relative to review of the question of race-based exercises of peremptory challenges.

i. Jones v. Ryan

The defendant in **Jones** appealed from denial of his writ of **habeas corpus**. He argued that the prosecution used its peremptory challenges to improperly "strike black persons from the jury in violation of his right to equal protection under the Fourteenth Amendment." **Jones v. Ryan, supra at 962**. The Court in **Jones** found that the defendant "established a **prima facie** case of purposeful discriminatory exercise of peremptory challenge [and] that the prosecution failed to articulate neutral and non- pretextual explanations for striking black persons from the jury."

Id. Accordingly, an equal protection violation was identified and a remedy granted.

The defendant in **Jones**, a young black man, was charged with the robbery of an elderly white man. During jury selection, the venire panel consisted of 40 persons, 32 of whom were white and eight were black. Of the eight black venire persons, four were called for voir dire. The prosecutor exercised four of his seven peremptory challenges. He used three of the four to strike all but one of the black venire persons called. The defense objected but the trial court refused to make any specific findings. Rather, the trial court opined that "a motion like this is divisive...Attorneys are creating racial hatred in this City." **Jones v. Ryan, supra at 962-963.**

At sentencing, defense counsel re-raised the issue as part of post-verdict motions. The court again refused to make a finding opting instead to state "your office is promoting racism in the court...and I think its unfair in provoking trouble within our community." **Id at 963**. The prosecutor thereafter gratuitously offered his reasons for usage of the challenges. He stated:

> One of the venire persons named Idonia Young was stricken because she had a son approximately the same age as Jones. It is my general policy that if at all possible, trying to avoid putting someone who has a child of approximately the same age [as the defendant] on the jury. The second venire person, named Karen Welton, was excluded because...my general policy...if there's a young potential juror as the same approximately age and race of the defendant as a general rule, if I have enough strikes I will keep them off the jury...That's my policy...to avoid any potential, any attraction, any given potential between the juror and the defendant...The third venire person, named Roy Sidberry, was excluded because I attempted to make eye contact with [him] and he sat rigidly in his seat and refused to make eye contact with me. [**Jones v. Ryan, supra at 964**].

The defendant filed a **habeas corpus** petition. The district court found the reasons articulated by the prosecutor to be adequate and non-pretextual. The **Jones** Court reversed. The Court in **Jones** stated:

> The prosecutor's explanation that his general policy of excluding jurors whose children were the same approximate age of the

defendant was the reason for challenging Ms. Young does not satisfy the concerns of **Batson**. The record reveals that the prosecutor did not apply this general policy to two white venire persons who possessed the identical characteristic of having children who were in the same age category as the defendant. Mr. Kolodziej had a nineteen year old son and two twenty year old daughters, nevertheless he was empaneled as a juror. App. at 34-35. Ms. Eisler had two sons, age twenty and a twenty-two, and she also served as a juror. Id. at 37. The presence of white jurors who possessed the same characteristic indicated that this explanation was pretextual.

The prosecutors reason for striking Ms. Welton was based on her race as it was specifically referenced in his explanation. The prosecutor stated "if there's a young potential juror as the same approximate age and race of the defendant, as a general rule, if I have enough strikes, I will keep them off the jury." Supp. App. at 24 (emphasis added). "The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race..." Batson 476 U.S. at 89.

The prosecutor's alleged general policy designed to eliminate even the potentiality of attraction between a juror and a defendant of the same age did not apply to several single white women who were empaneled as jurors, nor did it extend to one white woman who served as an alternate juror. Ms. Rajauski, an unmarried white woman from South Philadelphia was empaneled. App. at 31, 37. Ms. Kovach, an unmarried white woman from Manayunk, sat as an alternate juror. Id. at 39. Although the prosecutor tried to disclaim his statement that race was a factor in this particular peremptory policy, his explanation and application included race as a factor. The prosecutor did not exclude single white women from serving as jurors or alternates. Similarly situated white women apparently were not within the scope of the prosecutor's potential attraction theory. Race was identified as a basis to strike a black venire person. That discriminatory intent was inherent in the explanation given by the prosecutor. The Supreme Court has stated that a neutral explanation "means an explanation based on something other than the race of the juror." Hernandez, 111 S.Ct. at 1866. No such explanation was given here.

The prosecutor attempted to provide policy reasons as explanations for striking Ms. Young and Ms. Welton. However, general policy explanations, proffered in "good faith," may nonetheless stand in violation of the law presented in Batson. The Batson Court set forth the requirement that the prosecutor "must articulate a neutral explanation related to the particular case to be tried." 476 U.S. at 98. As the Court noted in Hernandez, general policy reasons may be found to be pretextual where the venire persons are challenged "without regard to the particular circumstances of the trial or individual responses of the jurors." 111 S.Ct. at 1873. The prosecutor's stated policy reasons did not meet the burden imposed by Batson because they are not related in any real sense to the particular events which transpired during the voir dire proceedings in his case. If, as the prosecutor claimed, venire persons who were parents of children of the same approximate age as Jones were unable to serve as impartial jurors, then the prosecutor should have challenged the two white jurors who possessed the same disability as Ms. Young. The record also indicates that the policy used to eliminate Ms. Welton was discarded where the venire persons

> were white women like Ms. Welton, single again like Ms. Welton, but white unlike Ms. Welton. **[Jones v. Ryan, supra at 973-974]**

ii. United States v. Uwaezhoke

a. The Majority Opinion

A divided panel of the Third Circuit found that "the government's explanation for excluding the juror herein was not facially invalid as a matter of law, and that the district court was not clearly erroneous in finding an absence of actual discriminatory intent." **United States v. Uwaezhoke, supra at 391**. The majority of the panel described the explanation accepted by the district court as relating to the juror's personal circumstances. The Court set forth its synopsis of the explanation. The Court stated:

> [The fact that the juror was] a single parent living in a rental property in the City of Newark who was supporting herself and two children on the income of a postal worker with four years tenure suggested to the government that she may be involved with a drug situation where she lives. **[United States v. Uwaezhoke, supra at 391]**

The majority set forth the ratiocination for finding this explanation to be race-neutral. The Court stated:

> The government here claims that, because of Ms. Lucas' likely place of residence, she was more likely to have had direct exposure to a drug trafficking situation than other potential jurors as a class and that the government could legitimately prefer to assume the least risk of a juror having had such an exposure. Whether or not one accepts his explanation as an accurate description of the government's motivation in challenging Ms. Lucas, it is clearly race-neutral on its face.
>
> The prosecutors, at the time they exercised the peremptory challenge, knew that Ms. Lucas was a single parent of two children who was making the salary of a postal worker with four years of seniority and renting an apartment in Newark, New Jersey. It is, we believe, fair to infer that the prosecutors, in the absence of any more detailed information concerning Ms. Lucas, speculated that she might live in low income housing in Newark. Having so speculated, the prosecutors inferred that Ms. Lucas was more likely to have had direct exposure to drug trafficking than someone who did not live in low-income housing in

> Newark. While this conclusion may or may not be empirically correct, we cannot say that it exhibits racially discriminatory intent as a matter of law.....
>
> While it is certainly conceivable, as Mr. Uwaezhoke suggests, that the prosecutor took one look at Ms. Lucas' color and thought. "Blacks who live in poor neighborhoods cannot be trusted to fairly enforce drug laws against other blacks", it is equally possible that the prosecutor concluded that anyone, regardless of color, who lives in a poor neighborhood in Newark may have had personal experience with drug trafficking that would make their reaction to trial evidence unpredictable. We cannot find that discriminatory intent was inherent on the face of the government's explanation, and so we hold that the explanation is valid as a matter of law. If there was actual racial discrimination lurking behind this explanation, it can be found only as a matter of fact. **[United States v. Uwaezhoke, supra at 393-394].**

The majority also ruled that an explanation which is "otherwise racially neutral on its face is not infirm solely because its repeated application would have a disparate impact on a particular racial group, that is, would result in the

exclusion of more members of one racial group than members of other racial groups." **United States v. Uwaezhoke, supra at 393.** The majority fashioned "a scrutiny with care" standard of review of disparate impact. This ruling was significant because the court found that the explanation herein, "if generally applied, would be likely to have a disparate impact on blacks in the vicinage and accordingly, is one that should be scrutinized with care." **Id at 394-395** The Court stated:

> If the government's explanation, generally applied, would have a disparate impact on a particular racial group this fact should cause a trial judge to exercise special scrutiny during the this step of the **Batson** process to determine whether intentional discrimination, as a matter of fact, underlies the government's peremptory challenge...But the role of disparate impact in the **Batson** analysis is as circumstantial evidence of discriminatory intent at the third stage and not as a controlling factor at the second. **[Id at 393].**

b. The Dissent

Judge Pollak dissented initially expressing a concern regarding the majority's conclusion that the district court did

not consider the "postal worker policy" in its decision. Judge Pollak demonstrated that such a policy would significantly and disparately reduce "black juror presence on venires." **United States v. Uwaezhoke, Id at 397-399.** Judge Pollak recommended "a remand to the district court to permit a determination by that court of whether the postal worker explanation is one to which it gave any weight." **Id, at 399.**

With regard to the stated rationale that "its a person involved in a drug situation where she lives", Judge Pollak expressed difficulty. "Those difficulties stem from what appears to be the inevitable compromise of racial randomness in jury selection that flows from that rationale. " **Id at 400.** Judge Pollak stated:

> Routinely to exclude from jury service in drug cases tried in the Newark federal courthouse a category of potential jurors defined by residence in Newark will have a substantial skewing effect on the racial composition of the juries thus selected. As has been noted, some 600,000-- or approximately one-fifth --- of the residents of the seven-county catchment area feeding the Newark federal courthouse are black. But, in Newark proper, blacks constitute 58.5% ---

approximately 160,000 --- of a city population of 275,000....

Of course the government's rationale does not necessitate striking all 160,000 blacks residing in Newark. The government's concerns center on persons "living in a low-income area." But that qualification does not necessarily carry with it much reassurance. Indeed, it may serve only to compound the difficulty. The government has not offered a description, in dollar metes and bounds, of Newark's "low-income area"; in the absence of such a description, we may be warranted in assuming that the government, in the district court and here, has had in mind, at a minimum, those sections of Newark that are inhabited by persons living below what the Census Bureau denominates as the "poverty level." Unhappily, "poverty level" correlates closely with race. In the northeastern United States (New England, New York, New Jersey and Pennsylvania), 9.2% of whites and 28.9% of blacks are below the poverty level .....

In sum, one cannot, on this record, say with assurance what impact the exclusion of "low-income" Newark residents from jury service in drug cases in the Newark federal

> courthouse would have on the racial composition of such juries. But one can with considerable confidence say that, measured against the racial distribution in the seven-county catchment area as a whole, such exclusion would, to a significant degree, disproportionately disqualify black potential jurors. **[Id at 400-401].**

Judge Pollak thereafter stated that he agreed that facially race-neutral explanations involving a disparate impact should be "scrutinized with care " to determine whether they are a mask for pre-text. In this context he stated that "a reading of the trial transcript does not suggest that the disparate impact on blacks, which the explanation [herein] entails, led the trial judge to undertake any special scrutiny, let alone to weigh the gravity of the probable impact against the substantiality of any legitimate concern of the prosecutor." **Id at 401-402.** Judge Pollak would have remanded this matter to the district for a re-examination of both of the explanations. Judge Pollak stated:

> For the reasons given, I am of the view that this case should be remanded to the district court for a reexamination of both of the

explanations for striking Ms. Lucas -- the postal worker explanation and the "it's a person that may be involved in a drug situation where she lives" explanation --- vouchsafed by the government at voir dire.

I would surmise that in the event of such a remand the government would elect not to pursue the proposition that postal workers as a class ---a class that numbers some 730,000 nationwide, U.S. Postal Service Work Force Profile (Aug. 21, 1992) --- are generically not to be trusted to try federal drug cases. That would leave the more serious question: in a city which is 58.5% black, is the exclusion from jury service in drug cases (which appear to constitute the largest category of federal felony prosecutions) of all persons who live in a "low-income area" compatible with Batson? **[Id at402-403]**.

II.

Certiorari Must Be Granted To Correct The Violation of Petitioner's Rights

Notwithstanding the majority view herein, the United States clearly challenged the potential African-American

juror exclusively on race-based criteria. The first rationale provided to the Court was concededly spurious---the second rationale was manifestly based on bigoted and prejudiced thinking and clearly did not constitute a "neutral explanation related to the case to be tried." **Batson v. Kentucky, supra at 96-98.** The United States had a weak and ambiguous case against a black defendant. Absent any basis in logic or fact, it isolated one of only two potential African-American jurors for removal from the petit jury venire "on the [unfounded] assumption that [the juror would] be unable to impartially consider the case against the black defendant." **Batson v. Kentucky, supra at 89**. Any unbiased evaluation of the United States' explanations for challenging the juror militate in favor of a finding of race-based exclusion requiring reversal of the convictions obtained herein.

ii.

Available Precedent Outside The Third Circuit Supports Position That A Reversal Is Mandated

It is not surprising that this Court's opinion in **Batson** has spawned much clarification litigation of the issue as to use of raced-based peremptory challenged to exclude blacks

from a petit jury. Indeed, there have been several post-**Batson** Supreme Court opinions which have attempted to clarify the Sixth Amendment/Equal Protection distinction. And, several circuit courts have analyzed the nature of a "racially neutral reason" for the government's decision to strike a prospective juror. In this context, it is highly significant that the Fourth Circuit has ruled that the seating of a black juror on the petit jury does not preclude a finding that a black defendant has established a **prima facie** case of **Batson** discrimination. In that case, **United States v. Joe, 928 F.2d 99 (4 Cir. 1991),** the United States used six of its eight peremptory challenges to strike back jurors.

In **United States v. Bennett, 923 F.2d 1543, 1551 (11 Cir. 1991)**, the Eleventh Circuit noted that "the fact that a prospective juror has prior family involvement with drugs charges has been deemed a racially neutral reason for the government to strike under **Batson**." See, **United States v. Alston 895 F.2d 1362, 1367 (11 Cir. 1990). Cf. United States v. Guerra-Marez, 928 F.2d 665, 673 (5 Cir. 1991)** (Struck jurors had drug problems or arrest records). The reason accepted in **Bennett** is a far cry from a claim that

a juror is "probably involved in a drug situation where she lives" because she rents an apartment. The Courts in **Bennett, Alston** and **Guerra-Marez** would clearly not have accepted that as a "racially neutral reason." See, **Murchu v. United States, 926 F.2d 50 (1 Cir. 1991)** (Americans of Irish ancestry were not a cognizable group for **Batson** purposes, absent showing that such persons were as a group singled out for discrimination in society). **Cf. Cunnigham v. Zant, 928 F.2d 1006 (11 Cir. 1991).**[7]

It is submitted that this Court has no just option other than to grant the writ and thereafter reverse the convictions obtained herein. The basis for the challenge herein was clearly related to race. The challenged juror was in no fashion unqualified or incompetent. In this context, we stress that the rationale provided by the prosecutor for the peremptory challenge to the juror is in no sense racially neutral. And, it must be remembered that the rationale adopted by the district court followed the initial offering of a

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7 Inattentiveness or inability to follow the evidence may also be a valid, racially neutral basis for exercising peremptory challenges. However, challenges on this ground deserve careful scrutiny and special care by counsel to fully develop the record concerning the specific behavior motivating counsel to make the challenge. **United States v. Sherrills, 929 F.2d 393, 395 (8 Cir. 1991).**

concededly false basis. The peremptory challenge exercised herein and the stated basis for it do not bespeak a necessarily malevolent or venally racist disposition. However, at a minimum it indicates a lack of sensitivity and an ingrained attitude which deprived both petitioner and the potential juror of a non-discriminatory selection process. We are certain that the juror would be appalled to hear that the prosecutor believes that she is "probably in a drug situation where she lives." That juror is employed by the Post Office and has no history of criminal behavior. See, **United States v. Horsley, 864 F.2d 1543 (11 Cir. 1989)** ("I just got a feeling about" is legally insufficient to refute **prima facie** case of purposeful racial discrimination).

In sum, a dreadful wrong to the constitutional concept of equal protection was committed below which denied a substantial right to a defendant on trial in a criminal matter. "The Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts of the [United States] is most compelling in the judicial system." **Powers v. Ohio, supra at 1373**. This Court must act to

eliminate discrimination from the system with a pedagogical reversal of petitioner's conviction.

Point II

Certiorari Sould Be Granted To Resolve The Dispute Between The Third And Ninth Circuits As To Whether Hernandez Required A Nexus Between The Particular Juror And The Facts Of The Case

In, **United States v. Bishop, 959 F.2d 820, 825 (9 Cir. 1992)**, the Ninth Circuit ruled that **Hernandez** "strongly suggests" that a nexus between a particular juror and the facts of the case must exist in order for the prosecutor's explanation of a proposed challenge to be facially valid. See, **United States v. Uwaezhoke, supra at 394, fn 5.** The Third Circuit in **Uwaezhoke** rejected this view. **Id.** We submit the Ninth Circuit's interpretation of **Hernandez** is correct. Moreover, such an interpretation is the singular manner in which pre-textual explanations may adequately be eliminated. This Court must so rule.

Conclusion

For the foregoing reasons, we respectfully request that this Court grant certiorari herein. "Race neutrality in

jury selection [is] a visible, and inevitable, measure of the judicial system's own committment to the commands of the Constitution." **Powers v. Ohio, supra at 1373**. This Court must manifest its committment lest prosecutors be encouraged to engender the "forbidden stereotype" in the selection process. **Id.**

Respectfully Submitted,

ALAN DEXTER BOWMAN
ATTORNEY FOR PETITIONER

RAYMOND A. BROWN
ALAN DEXTER BOWMAN
OF COUNSEL AND ON THE BRIEF

UNITED STATES COURT OFAPPEALS
FOR THE THIRD CIRCUIT

No. 91-5589

UNITED STATES OF AMERICA

v.

NDUCHE CHIMA UWAEZHOKE a/k/a Andy

Appellant

On Appeal From the United States District Court
For the District of New Jersey

(D.C. Criminal Action No. 90-00372-02)

Present: STAPLETON and MANSMANN, Circuit Judges, and POLLAK, District Judge*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on March 5, 1992.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered June 28,1991, be, and the same is hereby

affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

Acting Chief Deputy Clerk

Certified as a true copy and issued in lieu
of a formal mandate on June 21, 1993

Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5589

UNITED STATES OF AMERICA

v.

NDUCHE CHIMA UWAEZHOKE a/k/a Andy

Appellant

SUR PETITION FOR REHEARING

Before: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG HUTCHISON, SCIRICA, COWEN, NYGAARD, ROTH, LEWIS, Circuit Judges, and POLLAK, District Judge* *

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other

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* Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Walter K. Stapleton
Circuit Judge

Dated June 11, 1993

Supreme Court, U.S.
FILED
OCT - 6 1993
OFFICE OF THE CLERK

93-571

No.

In The

Supreme Court of the United States

October Term, 1993

NDUCHE CHIMA UWAEZHOKE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL APPENDIX

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Table of Appendix

Page

Opinion of the Third Circuit dated May 6, 1993.....1

Filed May 6. 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5589

UNITED STATES OF AMERICA

v.

NDUCHE CHIMA UWAEZHOKE a/k/a Andy

Appellant

On Appeal From the United States District Court
For the District of New Jersey

(D.C. Criminal Action No. 90-00372-02)

Argued: March 5. 1992

BEFORE: STAPLETON and MANSMANN, *Circuit Judges*, and POLLAK, *District Judge*•

(Opinion Filed May 6. 1993)

Michael Chertoff
United States Attorney

• Honorable Louis H. Pollak. United States District Judge for the Eastern District of Pennsylvania. sitting by designation.

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*.

This appeal challenges the conviction of Nduche Chima Uwaezhoke. Mr. Uwaezhoke, who is black, was charged, together with one Tony Butts, with four counts of heroin importation and related conspiracies. Mr. Butts pleaded guilty to one count of the indictment. Mr. Uwaezhoke went to trial. Mr. Butts was a principal witness at the trial, which resulted in a jury verdict of guilty on all four counts. Mr. Uwaezhoke was sentenced to concurrent terms of 216 months on each of the four counts.

The sole question presented by Mr. Uwaezhoke's appeal is whether, in the course of jury selection, the prosecution exercised one of its peremptory challenges in a racially discriminatory way, in contravention of *Batson v. Kentucky*, 476 U.S. 79 (1986).

I.

Appellant had ten peremptory challenges and exercised all of them. The government had six peremptory challenges and exercised two. The first of the government's peremptory challenges was directed at venireperson 324, Douglas Bath, a single unemployed male carpenter; the record contains no concrete evidence with respect to Mr. Bath's ethnicity, but since Mr. Uwaezhoke has not complained about the striking

of Mr. Bath. it seems a fair inference that Mr. Bath was not black. The second of the government's peremptory challenges was directed at venireperson 169. Kim R. Lucas. a black woman residing in Newark. New Jersey. who had appeared in the jury box as a replacement for the panelist who was the object of Mr. Uwaezhoke's ninth peremptory challenge. The record shows the following exchange with respect to the striking of Ms. Lucas:

> THE CLERK: Juror 3. 169. Kim R. Lucas.
>
> THE COURT: Yes. Miss Lucas.
>
> PROSPECTIVE JUROR NO. 3: A. five years. B. I'm a postal employee. I've been there four years. Not married. Single parent. two small children at home. I rent. aerobics. I cut hair. and I take tennis lessons. High School. I have a license in cosmetology and I go to college.[1]
>
> THE COURT: And did you hear the questions that I asked the other jurors?[2]
>
> PROSPECTIVE JUROR NO. 3: Yes.

---

1. The jurors responded to questions from a sheet of paper left on the jurors' chairs. The questions ask how long the juror has lived at the juror's present residence. what is the juror's occupation. how long has the juror been at his or her present job. who is the juror's spouse and what is the spouse's occupation. who are the juror's children and what are their occupations. does the juror rent or own her place of residence. what are the jurors hobbies and activities. what is the level of the juror's education and what degrees does the juror hold.

2. The district judge had asked everyone in the jury pool these questions: Do you know any of the participating attorneys or the defendant? Have you ever served on a jury before? Have you ever been the victim of a crime. or participated as a witness in a criminal trial? Have you heard anything about this case? Do you have any police officers in your family? Do you have any dealings with the U.S. government. any contracts with or claims against the U.S. government? Do you have any problem with the use of tape recorded conversations as evidence? Do you have any medical problems that would prevent you from wearing headphones? Have you ever had any problem with drugs. have you or anyone close to you been addicted to drugs? Will it affect your judgment that the defendant. although a U.S. citizen. is from Nigeria?

THE COURT: Is your answer yes to any of them?

PROSPECTIVE JUROR NO. 3: No.

THE COURT: All right. Thank you very much. Mr. Tannenbaum.

MR. TANNENBAUM: The United States would request that Juror 3 be excused.

THE COURT: All right. Miss Lucas, thank you very much.

MR. BROWN: I want to be heard at sidebar, if your Honor please.

THE COURT: All right.

(The following occurs at sidebar.)

THE COURT: Yes.

MR. BROWN: Your Honor, this is obviously racial. I wanted to make a challenge. People sat in that seat time and again. Everyone was approved. The moment a black sits down there is a targeted thrust at that particular person.

I realize that it's peremptory, but I understand that under your rules, the Supreme Court ruled that if there is an indication of racial selectivity, that that is illegal and is to be prohibited. That was as clear as a bell.

THE COURT: Mr. Tannenbaum, what was the basis for the challenge?

MR. TANNENBAUM: We challenged her because it's a general policy. She was a postal employee, and we usually don't like to have postal employees on the jury. It has nothing to do with any racial –

MR. BROWN: Judge, I've tried cases in this courthouse for a long time. If that is a new policy to challenge postal authorities, that is a brand new policy.

As a matter of fact, the practical approach has been that these people favor the federal government because they are employed by them. But to say that there is a policy to challenge postal employees –

THE COURT: Are you stating?

MR. REPETTO: It's not a policy.

MR. TANNENBAUM: No. It's not a policy per se.

MR. BROWN: I would like to have what he said read back.

THE COURT: No. Mr. Repetto?

MR. REPETTO: We have a black juror that has been on from the initial panel. Nobody challenged her.

THE COURT: I want to know why you challenged this particular juror.

MR. REPETTO: This particular juror is employed by the Postal Service. There is a problem with Postal Service jurors in these kinds of cases. It is a person that is a single parent. It's also a person that rents. It's a person that may be involved in a drug situation where she lives.

There is a lot going to this other than the fact that she is black. and there is a black juror on that nobody touched.

MR. BROWN: That's the point.

THE COURT: I'm going to accept the government's explanation.

MR. BROWN: But. Judge. I challenge the concept that postal workers –

THE COURT: Other reasons were given. We'll stand on the record.

MR. BROWN: There were no other reasons. The neighborhood?

THE COURT: The record will speak for itself.

MR. BROWN: Yes. It shall. and I want to go on the record objecting and asking for a mistrial based upon a deliberate use of a prejudice and racial challenge.

THE COURT: I will note that Juror No. 4 is black and has not been challenged throughout.

> MR. BROWN: But that's not the standard. The standard is why is someone challenging for racial reasons. The answer that there is a policy, and I remember the word –
>
> THE COURT: But it was expanded upon by Mr. Repetto. All right, yes. Motion denied.
>
> (End of sidebar discussion.)

Supp. App. 52-55.

As the quoted colloquy indicates, the government advanced two reasons for challenging Ms. Lucas. The first, advanced by prosecutor Tannenbaum, was that the United States Attorney's Office had a policy favoring the exercise of peremptory challenges in drug cases to exclude anyone who was a postal employee. The second, advanced by prosecutor Repetto, was that Ms. Lucas' personal circumstances (i.e., those of a single parent living in a rental property in the city of Newark who was supporting herself and two children on the income of a postal worker with four years' tenure) suggested to the government that she "may be involved with a drug situation where she lives." As we read the trial transcript, the judge was as incredulous as Mr. Brown about the existence of a policy excluding postal workers, per se, but accepted the "other reasons [that] were given." Thus, it was the Repetto explanation which the district court found to be the one that actually motivated the government's challenge of Ms. Lucas.

The district court, in accepting the government's peremptory challenge, found that the reason for the government's challenge was a race-neutral one and that this race-neutral reason was not a mere pretext for racial discrimination. We find that the government's explanation for excusing the juror was not facially invalid as a matter of law, and that the district court was not clearly erroneous in finding an absence of actual discriminatory intent. We will affirm the district court's ruling and Mr. Uwaezhoke's conviction.

II.

Recently, in the plurality opinion in *Hernandez v. New York*, _____ U.S. _____, 111 S.Ct. 1859, 1865-66 (1991),

Justice Kennedy summarized the process prescribed by *Batson* that is to be followed in a criminal case when defense counsel raises a *Batson* challenge to the prosecutor's exercise of a peremptory challenge:

> In *Batson*, we outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause....First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race....Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. ... Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

A.

This court has underscored the importance of the first step of the three-step *Batson* process. In *United States v. Clemmons*, 892 F.2d 1153, 1156 (3d Cir. 1989), we held that the

> *Batson* Court contemplated that the traditional peremptory challenge process would not be intruded upon absent some reason to believe that discrimination might be at work....Accordingly, district courts should expressly address the prima facie issue before requiring an explanation from the prosecutor.

While we continue to stress the importance of the first step of *Batson*, we note that any issue regarding the existence of a prima facie showing of discrimination becomes moot where, as in this case, the prosecutor offers an explanation of the peremptory challenge before the district court has "expressly address[ed] the prima facie issue". In so holding, we follow the conclusion of the plurality in *Hernandez* that "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes

moot." 111 S.Ct. at 1866. If the government is found at any subsequent stage of the case either to have tendered an explanation that is not race neutral or to have acted with racial animus, the conviction must be overturned without regard to whether the defendant established a prima facie case.

B.

In the second step of the *Batson* process the government must offer an explanation for the peremptory challenge that is race-neutral. As the *Hernandez* plurality observed, "[i]n evaluating the race-neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause *as a matter of law*." 111 S.Ct. at 1866 (emphasis added).[3]

The *Hernandez* plurality articulated the relevant legal issue at this stage as follows:

> A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. 111 S.Ct. at 1866

Thus, if the government's explanation does not, on its face, discriminate on the basis of race, then we must find that the explanation passes *Batson* muster as a matter of law, and we pass to the third step of *Batson* analysis to determine whether the race-neutral and facially valid reason was, as a matter of fact, a mere pretext for actual discriminatory intent.

In determining whether the government has satisfied the requirements of *Batson* at the second step, we must keep firmly in mind that *Batson*'s holding rests squarely on the

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3. See also *United States v. Johnson*, 941 F.2d 1102, 1108 (10th Cir. 1991) (whether the prosecutor's explanation is race neutral is a question of law).

Equal Protection Clause. Equal Protection jurisprudence thus governs our determination of whether the appellant has a *Batson* claim. Under that jurisprudence, this court may remedy only those acts of racial discrimination that are intended by the government. The Supreme Court has repeatedly held that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact... Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65 (1977); see also, *Washington v. Davis*, 426 U.S. 229, 239 (1976). Intention to unlawfully discriminate is thus an essential element of a *Batson* violation.

This means that an explanation which is otherwise racially neutral on its face is not infirm solely because its repeated application would have a disparate impact on a particular racial group – that is, would result in the exclusion of more members of one racial group than members of other racial groups. If the government's explanation, generally applied, would have a disparate impact on a particular racial group, this fact should cause a trial judge to exercise special scrutiny during the third step of the *Batson* process to determine whether intentional discrimination, as a matter of fact, underlies the government's peremptory challenge.[4] Indeed, a trial judge may be justified in concluding at that stage that discriminatory intent has played a role in the challenge

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4. We mean by this only that the existence of a disparate impact on a particular racial group may constitute very probative circumstantial evidence of racial animus and, like any such evidence, should cause the trial judge to examine the contrary evidence with care. We do not mean to suggest that existence of a disparate impact alters the legal standard the trial judge should apply in determining whether a constitutional violation has occurred. Nor do we suggest that where, as here, no one has relied upon the alleged disparate impact of a tendered explanation, the trial judge has a duty to stop in the middle of the *voir dire* and consider whether the tendered explanation may have such an impact. We cannot fault the trial judge in this case for not expressly addressing the possibility of a disparate impact. Being unable to fault his original performance, we perceive no reason to remand this case and insist that he go through the *Batson* process again.

when the disparate impact is great and any legitimate concern of the prosecutor slight. But the role of disparate impact in the *Batson* analysis is as circumstantial evidence of discriminatory intent at the third stage and not as a controlling legal factor at the second.

The government here claims that, because of Ms. Lucas' likely place of residence, she was more likely to have had direct exposure to a drug trafficking situation than other potential jurors as a class and that the government could legitimately prefer to assume the least risk of a juror having had such an exposure. Whether or not one accepts this explanation as an accurate description of the government's motivation in challenging Ms. Lucas, it is clearly race-neutral on its face.

The prosecutors, at the time they exercised the peremptory challenge, knew that Ms. Lucas was a single parent of two children who was making the salary of a postal worker with four years of seniority and renting an apartment in Newark, New Jersey. It is, we believe, fair to infer that the prosecutors, in the absence of any more detailed information concerning Ms. Lucas, speculated that she might live in low income housing in Newark. Having so speculated, the prosecutors inferred that Ms. Lucas was more likely to have had direct exposure to drug trafficking than someone who did not live in low-income housing in Newark. While this conclusion may or may not be empirically correct, we cannot say that it exhibits racially discriminatory intent as a matter of law. Finally, the prosecutors concluded that if they had their preference (as they did so long as they retained a peremptory challenge), they would rather not have jurors who have had personal experience with drug trafficking. While neither the district court nor the defense attorney pressed the prosecutors to spell out their reasoning, it is possible that the prosecutors may have wanted to avoid jurors with direct drug experience for any number of legally legitimate reasons, the most likely of which is a concern that a personal experience may have left a strong impression on the juror, thus

influencing her evaluation of the evidence in a way difficult for the prosecutors to predict.[5]

While it is certainly conceivable, as Mr. Uwaezhoke suggests, that the prosecutor took one look at Ms. Lucas' color and thought, "Blacks who live in poor neighborhoods cannot be trusted to fairly enforce drug laws against other blacks", it is equally possible that the prosecutor concluded that anyone, regardless of color, who lives in a poor neighborhood in Newark may have had personal experience with drug trafficking that would make their reaction to trial evidence unpredictable. We cannot find that discriminatory intent was inherent on the face of the government's

---

5. A prosecutor may rationally believe, for example, that a juror living in a neighborhood with a drug problem may fear retaliation from dealers there if she votes to convict an alleged drug trafficker or may have had an unpleasant contact with the police in the context of drug trafficking.

We do not, of course, suggest that the information available to the government would support a finding that Ms. Lucas, more probably than not, would be an unqualified juror, or even an undesirable juror from the government's point of view. But that is not what peremptory challenges are all about. A primary reason for their existence is that it is not feasible for lawyers to know much about individual jurors. Counsel must rely on educated guesses about probabilities based on their limited knowledge of a particular juror and their own life experiences. If a lawyer can show some specific conflict between information about a particular juror and the particular case to be tried, he or she is in a position to make a challenge for cause. Peremptory challenges are intended for those situations in which counsel cannot demonstrate such a specific conflict, but has some reason to believe a prospective juror *may* be less desirable from his or her perspective as contrasted with other jurors likely to be called in the event of a peremptory challenge.

We can find nothing in the plurality opinion of *Hernandez* that suggests that the prosecutor must offer a nexus between a particular juror and the particular case that tends to demonstrate the juror would be unable to fairly evaluate the evidence; the opinion merely notes that the facts before it presented the question of how the absence of such a nexus would affect the determination of a *Batson* violation. We thus disagree with the Ninth Circuit's view that *Hernandez* "strongly suggests" that a nexus between particular juror and the facts of the case must exist in order for the prosecutor's explanation of a proposed challenge to be facially valid. *United States v. Bishop*, 959 F.2d 820, 825 (9th Cir. 1992).

explanation, and so we hold that the explanation is valid as a matter of law. If there was actual racial discrimination lurking behind this explanation, it can be found only as a matter of fact.

C.

Turning to the third step of our *Batson* analysis, we must ask whether the district court erred in finding that the government's facially valid explanation for the peremptory challenge was not, as a matter of fact, a mere pretext for discriminatory intention. The district court found that there was no discriminatory intention, and we review that finding to determine if it was clearly erroneous. *United States v. Casper*, 956 F.2d 416, 419 (3d Cir. 1992). We must accept the factual determination of the district court unless that determination "either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data." *Haines v. Liggett Group Inc.*, 975 F.2d 81, 92 (3d Cir. 1992), quoting *Krasnov v. Dinan*, 465 F.2d 1298, 1302 (3d Cir. 1972).

We find credible record evidence that logically supports the district court's determination that the government had no intent to discriminate against black jurors. As we have indicated, prosecutor Repetto tendered to the district court a racially neutral explanation that was plausible. Moreover, as the trial judge noted at the time, this explanation was buttressed by the fact that the government had earlier had repeated opportunity to challenge the black juror who in fact served on Mr. Uwaezhoke's jury, and declined to do so. We acknowledge that Repetto's explanation would have been more credible if the government's far less plausible alternative explanation had not been advanced. We also acknowledge that Repetto's explanation, if generally applied, would be likely to have a disparate impact on blacks in the vicinage and, accordingly, is one that should be scrutinized with care. We are unwilling to hold, however, that these facts, singly or together, required the district court to reject Repetto's explanation. The trial judge was far better situated than we to determine whether that

explanation was fact or pretext. He concluded that it was fact, and we cannot fault him for doing so.

The conviction of the appellant will be affirmed.

POLLAK, *District Judge*, dissenting.

I.

In the United States Courthouse in Newark, New Jersey, in the course of jury selection for the trial of Nduche Chima Uwaezhoke on charges involving the importation and planned distribution of heroin, the government undertook to use one of its peremptory challenges to unseat prospective Juror No. 3, Kim R. Lucas. Ms. Lucas, like Mr. Uwaezhoke, is black. Raymond A. Brown, Esq., Mr. Uwaezhoke's attorney, objected that the peremptory challenge was keyed to Ms. Lucas' race, in contravention of *Batson v. Kentucky*, 476 U.S. 79 (1986). The district court asked government counsel to explain the grounds for its peremptory challenge of Ms. Lucas. Jason W. Tannenbaum, Esq., and Bruce Repetto, Esq., the Assistant United States Attorneys representing the government, identified two grounds for the challenge:

First, Mr. Tannenbaum said:

> We challenged her because it's a general policy. She was a postal employee, and we usually just generally don't like to have postal employees on the jury. It has nothing to do with any racial –

Appellee's Supp. App. at 53. In further colloquy the government seemed initially to back-track: Mr. Repetto said that "[i]t's not a policy;" and Mr. Tannenbaum said that "It's not a policy per se." *Id.* at 54. But, when pressed by the district court, Mr. Repetto went on to say:

> This particular juror is employed by the Postal Service. There is a problem with Postal Service jurors in these kinds of cases.

Id.

Second, Mr. Repetto then added:

> It is a person that is a single parent, it's also a person that rents, it's a person that may be involved in a drug situation where she lives.

> There is a lot going to this other than the fact that she is black, and there is a black juror on that nobody touched.

Id.

When Mr. Brown renewed his objection, the district court said: "I'm going to accept the government's explanation." *Id.* Mr. Brown objected again: "Judge, I challenge the concept that postal workers —." to which the district court responded: "Other reasons were given. We'll stand on the record." *Id.* at 54-55. Mr. Brown persisted. The district court said that "[t]he record will speak for itself." *Id.* at 55. Mr. Brown moved for a mistrial. *Id.* The district court noted "that Juror No. 4 is black and has not been challenged throughout." *Id.* Mr. Brown again referred to the government's invocation of a "policy." *Id.* And the district court replied: "But it was expanded upon by Mr. Repetto. All right, yes. Motion denied." *Id.*

Mr. Uwaezhoke was found guilty by the jury on each of the four drug counts with which he was charged; he was thereafter sentenced to a lengthy prison term.

II.

In appealing the judgment of conviction, Mr. Uwaezhoke has assigned but one error — the district court's rejection of his *Batson* claim. Mr. Uwaezhoke contends that both of the government's stated grounds for striking Ms. Lucas — her status as a postal worker, and Mr. Repetto's conjecture that Ms. Lucas "may be involved in a drug situation where she lives" — are pretextual: i.e., flimsy camouflage for Ms. Lucas' race.

This court upholds the district court's *Batson* ruling. The court's judgment of affirmance rests upon two intermediate conclusions:

The *first* conclusion is that, "[a]s we read the trial transcript, it was the Repetto explanation [that Ms. Lucas 'may be involved in a drug situation where she lives'] which the district court found to be the one that actually motivated the government's challenge of Ms. Lucas." Typescript at 6.

The *second* conclusion is that the district court, by acquiescing in the government's challenge of Ms. Lucas, made a finding, which is not clearly erroneous, that the Repetto explanation was not pretextual.[1]

I dissent because I find both conclusions troublesome. Believing that neither the correctness nor the incorrectness of those two conclusions can be confidently demonstrated on this record, I am persuaded that the case should be remanded to permit the district court to amplify its findings.

I turn now to an explanation of why, in my judgment, the two conclusions are troublesome.

A.

(1) *Was the "Repetto explanation" the only ground for striking Ms. Lucas?*

As I have pointed out, this court finds, on the basis of its reading of the trial transcript, that the district court

---

1. I have no quarrel with – on the contrary, I agree with – the analytic scenario utilized by the Court in examining the legal viability of a proffered explanation for a prosecutorial peremptory challenge. The applicable scenario, prescribed in *Batson* and reaffirmed in *Hernandez v. New York*, _____ U.S. _____, 111 S. Ct. 1859 (1991) (plurality opinion) (citations omitted), is as follows:

> In *Batson*, we outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause. . . . First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Id. at 1865-66.

In the present case, as the court explains, the requirement of a prima facie showing that the challenge to Ms. Lucas was racially based was mooted by the district court's asking the government to explain the grounds for the challenge.

concluded that the government, in striking Mr. Lucas, was only relying on the "Repetto explanation" – that Ms. Lucas "may be involved in a drug situation where she lives" – and not on the Tannenbaum postal-worker explanation.

The court's reading may be correct. But – given that Mr. Repetto, while recharacterizing Mr. Tannenbaum's explanation, elected not to disavow it but simply to add his own explanation – I am of the view that the transcript is at least as consistent with the inference that the district court accepted the two explanations in combination, Mr. Tannenbaum's explanation having been "expanded upon by Mr. Repetto."

(2) *Why it matters whether the postal-worker explanation also played a part in the striking of Ms. Lucas*

It matters a good deal whether the postal-worker explanation was or was not relied on in some measure by the district court. The court's conclusion that the district court (1) found that the Repetto explanation was all that motivated the government's challenge and (2) hence gave the postal-worker explanation no weight has freed the court from addressing the question "whether the [postal-worker] explanation ... was racially neutral as a matter of law." Typescript at 8, n.3.

Because I do not share the court's confidence that the postal-worker explanation was given no weight by the district court, I am obligated to address the question whether the postal-worker explanation is incontestably viable as a matter of law. If the answer to that question is in the affirmative, then it would not matter if the district court did deem the postal-worker explanation to be part of the government's aggregate rationale in striking Ms. Lucas – assuming, of course, that the government's other explanation is legally viable, a question to be separately addressed. But if the postal-worker explanation is deficient as a matter of law, or if the question of its legal sufficiency may turn on factual findings that the district court has not articulated, then I would think that our proper course would be to remand this case to the district court so that it could determine whether it gave weight to the postal-worker explanation and, if so, why.

I turn, then, to the question of the legal viability of the postal-worker explanation. There would appear to be no question that the explanation is, on its face – i.e., confining judgment to the four corners of verbal utterance – race-neutral. "Once the prosecutor offers a race-neutral basis for his exercise of peremptory challenges, '[t]he trial court then [has] the duty to determine if the defendant has established purposeful discrimination.' *Batson*, 476 U.S., at 98, 106 S. Ct., at 1723-24. . . . If a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination." *Hernandez*, 111 S. Ct. at 1868.

The record before this court does not lend itself to a confident answer to the question whether the exclusion of postal workers from serving as jurors in criminal trials in the federal courthouse in Newark would bear more heavily on blacks than non-blacks. Part of the difficulty is that we have no way of knowing, from the statements of Messrs. Tannenbaum and Repetto in the district court, whether the proposed exclusion of postal workers focuses on Newark, Ms. Lucas' residence, or extends to the entire jury catchment area of the Newark federal courthouse.

Getting a handle on the statistical implications of the latter scenario is not easy, because we lack complete information. The Newark federal courthouse's jury catchment area consists of seven northern-tier New Jersey counties – Bergen, Essex (in which Newark is located), Hudson, Morris, Passaic, Sussex and Union. According to the 1990 census, the aggregate population of these seven counties is slightly more than 3,000,000, of which number about 600,000 – approximately one-fifth – are black. *1990 Census of Population: General Population Characteristics, New Jersey, Section 1* (1992) pp. 23-25. Unfortunately, there appear to be no readily accessible data as to the proportion of postal employees in the seven-county area who are black. However, we do know that, as of August 1992, the state-wide postal work force numbered some 30,000, of whom 24.3%, or approximately one-fourth, were black. *U.S. Postal Service Work Force Profile* (Aug. 21,

1992). The 1990 census tells us that the total population of New Jersey is 6,130,000, of whom 1,037,000, or slightly more than one-sixth, are black. *U.S. Bureau of the Census, State and Metropolitan Area Data Book, 1991* (1991) Table E, pp. 208-09. In short, the proportion of blacks in the jury catchment area – approximately one-fifth – is slightly higher than the proportion of blacks in the state as a whole. So it seems a fair surmise that the proportion of blacks in the postal work force in the catchment area is at least as large as the proportion of blacks in the postal service state-wide – namely, approximately one-fourth. And to exclude from jury service several thousand postal workers, one-fourth of whom are probably black, who reside in a jury catchment area which is one-fifth black, would appear to work a slightly-more-than-random exclusion of blacks. The deviation from randomness is not of major dimension, but it would seem significant enough to call for some justification.

If, on the other hand, the exclusion of postal workers from federal criminal juries were to focus solely on postal workers in Newark, the target population would be smaller, but the disproportionate impact would be considerably greater: as of August 1992, 1641 out of 2512 – or 65.3% – of Newark's postal workers were black. *U.S. Postal Service Minority Census Reporting System, Finance Minority Profile Consolidated Report* (City: Newark 07102-9998 (8/11/92)). Here, justification would seem imperative.

In its brief on appeal the government has proffered a somewhat tepid justification for a prosecutorial strategy of striking postal workers from federal criminal juries:

> In regard to postal employees, it is true, as Uwaezhoke argued before the district court, that postal employees are Government employees, and that some prosecutors may view them favorably for that reason. Supp. App. at 53-54. However, it is also true that all crimes committed by postal employees at the work place are federal crimes that are prosecuted by the U.S. Attorney's Office. A prosecutor may prefer not to have postal employees on the jury because of a fear that some postal employees harbor an antipathy towards the U.S. Attorney's Office for prosecuting

> relatively minor, but job-related, theft and drug offenses, when similar crimes otherwise might be ignored by state and local prosecuting authorities.

Appellee's Brief at 15-16.

The government's announced justification, such as it is, was not presented to the district court, so we do not have the benefit of that court's assessment of its pertinence.

Neither the government nor the defense has identified – and I have not been able to discover – any reported federal case in which the prosecution has sought to disqualify postal workers, as a class, from jury service. There is one reported state case – a Texas case, *Tompkins v. State*, 774 S.W.2d 195 (Tex. Ct. Cr. App. 1987) – involving a peremptory challenge of this sort. The *Tompkins* case is instructive.[2] *Tompkins* involved "capital murder" – a killing that occurred in the course of a robbery and kidnapping. The defendant was convicted and sentenced to death. Among the numerous issues presented on appeal was whether the trial court had erred in sustaining peremptory challenges to five black members of the venire. With respect to the fifth peremptory challenge, the Texas Court of Criminal Appeals – Texas' highest court of criminal jurisdiction – had this to say:

> The fifth black venireperson gives us great concern because the testimony reflects that that person was peremptorily struck solely, by the testimony of the prosecuting attorney who testified on this point, because he had been an employee of the United States Postal Service for some thirteen years, and not "simply because he was black."
>
> The record reflects that that venireperson expressed a certain difficulty understanding the law of causation in criminal cases, as well as the notions of "probability" and "continuing threat to society" concerning the punishment issues, which understanding we find was

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2. For leading me to *Tompkins*, I am indebted to Professor Albert W. Alschuler's valuable article, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 *U. Chic. L. Rev.* 153, 176 (1989).

> essential in order for the juror to decide whether appellant was guilty of capital murder and, if so, whether there was a probability that appellant would thereafter commit criminal acts of violence that would constitute a continuing threat to society. However, our reading of the entire jury selection process in this case discloses widespread disagreement and uncertainty among the venirepersons, as it does in nearly every capital murder case, regarding legal definitions and concepts, which are usually alien to most venirepersons. Not surprisingly, it is not uncommon for those venirepersons to appear inarticulate, confused, and tentative under these conditions. We find that this prospective black venireperson's answers to questions asked did not indicate an inability on his part, that was any greater or less than the unchallenged venirepersons, to understand the law or to apply it impartially. This venireperson also did not indicate a bias or prejudice against any phase of the law pertinent to this case. Indeed, the State did not urge at the hearing any such basis upon which to doubt the venireperson's qualifications for jury service. As noted, the sole reason given why the venireperson was struck was that he was an employee of the United States Postal Service.
>
> We have some difficulty understanding the relevancy of a venireperson's employment as a postman employed by the United States Government as far as his qualifications for jury service. Although the prosecuting attorney indicated that "I have not had very good luck with postal employees," she did not elaborate upon her evident bias against such employees. Perhaps, indeed, federal postal employees share a common view of the criminal justice system antithetical to the interests of law enforcement. But if so, we are not aware of it, nor has the State undertaken to enlighten us further on the subject.

774 S.W. 2d at 205.

One who had read this much of the Court of Criminal Appeals' opinion might well have expected that the quoted

analysis presaged reversal. Not so. The court had a surprise in store:

> Notwithstanding what we have stated, we find that the prosecuting attorney's reasons that she gave constitute a racially neutral explanation, and it is not the office of this Court to judge her credibility.

Id.

The Supreme Court granted certiorari, limiting its review to the peremptory challenges and certain death sentence issues. With respect to the challenge to the fifth venireperson, Texas, in its brief in the Supreme Court, argued that the Court of Criminal Appeals erred in finding that the challenge was predicated on his status as a postal worker:

> Viewed in context, it is apparent that the prosecutor's statement that she had not had luck with postal employees was more in the nature of a parenthetical comment than an asserted reason for excluding Green. In finding that Green was excluded solely on the basis of his employment, the Court of Criminal Appeals ignored the reasons actually advanced by the prosecutor as well as the findings of the trial court.

Tompkins v. Texas, (U.S. No. 87-6405) Respondent's Brief at 29.

The Supreme Court, without opinion, affirmed by an equally divided Court, 490 U.S. 754, 109 S.Ct. 2180 (1989), a disposition without precedential weight. *Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987); *Neil v. Biggers*, 409 U.S. 188, 192 (1972).

Like the Texas Court of Criminal Appeals, I can posit it as a conceptual possibility that "federal postal employees share a common view of the criminal justice system antithetical to the interests of law enforcement." But in the case at bar — putting aside Mr. Repetto's observation that "[t]here is a problem with Postal Service jurors in these kinds of cases" — the government offered the district court not a single allegation of fact, whether relating to postal workers in general or Ms. Lucas in particular, that would

tend to translate that conceptual possibility into an actual prosecutorial problem. And the government's *ex post* conjecture, in its brief on appeal, that a prosecutor might entertain "a fear that some postal employees harbor an antipathy towards the U.S. Attorney's Office" because that office is charged with enforcing Postal Service work-place crimes, only serves to underscore the lacunae in the record made at voir dire.

Given the opacity of the voir dire record with respect to the postal-worker explanation, I think the proper course would be a remand to the district court to permit a determination by that court of whether the postal worker explanation is one to which it gave any weight when it overruled the defense's objection to the striking of Ms. Lucas.

Were the district court to find that it had given weight to the postal-worker explanation, it would then be open to the government to undertake to show in what way the presence on Mr. Uwaezhoke's jury of any postal worker, or of Ms. Lucas in her postal-worker status in particular, might have been reasonably thought by the government to be detrimental to the government's chances of getting its case fairly considered. The district court would then have a record basis for deciding whether the government's concerns (1) had a sufficient grounding in reality so as to outweigh whatever the district court might find to be the probable reduction in black juror presence entailed in excluding postal workers, or (2) were so incongruous as to be properly characterized as pretextual.

If, on the other hand, the district court were to find that it had not given weight to the postal worker explanation (thereby confirming my colleagues' reading of the trial transcript), it would then follow that Mr. Uwaezhoke's conviction should be upheld — unless the government's alternative explanation for striking Ms. Lucas ("it's a person that may be involved in a drug situation where she lives"), an explanation that the district court manifestly did give weight to, is flawed. To that question, I now turn.

B.

This court affirms the action of the district court in upholding the government's peremptory challenge of Ms.

Lucas, a black woman of modest income bringing up two small children in an apartment in Newark – a peremptory challenge defended by the government on the stated rationale that "it's a person that may be involved in a drug situation where she lives." I have difficulties with the government's stated rationale. Those difficulties stem from what appears to be the inevitable compromise of racial randomness in jury selection that flows from that rationale. In its brief in this court the government elaborates on the rationale:

> In regard to the Government's comment that Ms. Lucas "may be involved in a drug situation where she lives." Supp. App. at 54, the Government was aware that Ms. Lucas rented an apartment in Newark, New Jersey. Supp. App. at 61. It was not unreasonable for the Government to speculate that Ms. Lucas, living on a single income from her postal employment, supporting a child, in an apartment in Newark, New Jersey, may be living in a low-income area that has a drug problem.

Appellee's Brief at 16.

Elsewhere in its brief the government explains the particular significance of Ms. Lucas' residence *in Newark*:

> Contrary to Uwaezhoke's suggestion, the Government's statement that Ms. Lucas "may be involved in a drug situation where she lives." Supp. App. at 54, was not based on racist assumptions about Blacks. Although one certainly need not live or work in Newark, New Jersey to be familiar with its reputation as a national leader in the areas of drug crime and violent crime, it is noteworthy that the U.S. Attorney's Office for the District of New Jersey, where the prosecutors work every day, is located in Newark. The Government's suggestion that Ms. Lucas may live in a high crime area that experiences drug problems is certainly a reasonable inference based on: (1) Ms. Lucas' likely economic status as a single parent supporting a child on her salary from the post office, and (2) the fact that she resides in an apartment in Newark. Supp. App. at 52, 61. Had the Government

> made a similar comment about a Black professional woman from the suburbs. Uwaezhoke's argument might have some merit. On the facts of this case, it has none.

Id. at 12 n.3.

Routinely to exclude from jury service in drug cases tried in the Newark federal courthouse a category of potential jurors defined by residence in Newark will have a substantial skewing effect on the racial composition of the juries thus selected. As has been noted, some 600,000 – or approximately one-fifth – of the residents of the seven-county catchment area feeding the Newark federal courthouse are black. But, in Newark proper, blacks constitute 58.5% – approximately 160,000 – of a city population of 275,000. *U.S. Bureau of the Census, Statistical Abstract of the United States: 1992* (112th ed., 1992) p. 36.

Of course the government's rationale does not necessitate striking all 160,000 blacks residing in Newark. The government's concerns center on persons "living in a low-income area." But that qualification does not necessarily carry with it much reassurance. Indeed, it may serve only to compound the difficulty. The government has not offered a description, in dollar metes and bounds, of Newark's "low-income area"; in the absence of such a description, we may be warranted in assuming that the government, in the district court and here, has had in mind, at a minimum, those sections of Newark that are inhabited by persons living below what the Census Bureau denominates as the "poverty level." Unhappily, "poverty level" correlates closely with race. In the northeastern United States (New England, New York, New Jersey and Pennsylvania), 9.2% of whites and 28.9% of blacks are below the poverty level. *Id.* at 457, Table 720; (1990 "weighted average poverty threshold" for three-person households was $10,419, *id.* at 427).[3]

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3. In making educated guesses about the racial impact of excluding "low-income" Newark residents from juries trying drug cases, one should also bear in mind that (1) 26.1% of Newark's population is Hispanic, *U.S. Bureau of the Census, Statistical Abstract of the United States: 1992* (112th ed., 1992) 36, (2) "Hispanic persons may be of any race," *id.* at 37 n.2, and (3) 36.4% of Hispanics in the northeastern United States are below the poverty line. *Id.* at 457, Table 720.

In sum, one cannot, on this record, say with assurance what impact the exclusion of "low-income" Newark residents from jury service in drug cases in the Newark federal courthouse would have on the racial composition of such juries. But one can with considerable confidence say that, measured against the racial distribution in the seven-county catchment area as a whole, such exclusion would, to a significant degree, disproportionately disqualify black potential jurors.[4]

The court, in applying the three-stage *Batson/Hernandez* inquiry,[5] concludes – and I agree – that the government's rationale for excluding "low-income" persons from serving as jurors in drug cases is, on its face, race-neutral. As the court puts it:

> While it is certainly conceivable, as Mr. Uwaezhoke suggests, that the prosecutor took one look at Ms.Lucas' color and thought, "Blacks who live in poor neighborhoods cannot be trusted to fairly enforce drug laws against other blacks," it is equally possible that the prosecutor concluded that any one, regardless of color, who lives in a poor neighborhood in Newark may have had personal experience in drug trafficking that would make their reaction to trial evidence unpredictable. We cannot find that discriminatory intent was inherent on the face of the government's explanation, and so we hold that the explanation is valid as a matter of law. If there was actual racial discrimination lurking behind this explanation, it can be found only as a matter of fact.

Typescript at 11-12.

I also agree with the court that the fact that an apparently race-neutral rationale may entail a racially disparate impact does not, as a matter of law, vitiate the facial racial neutrality of the rationale but, rather, poses a factual question to be addressed at the third stage of the

---

4. Also, of course, such exclusion would, as intended, skew the class composition of juries. But that effect does not, in terms, fall within the *Batson* interdiction.

5. *See supra* note 1.

Batson inquiry – the stage at which, having determined that the government's stated rationale is, as a verbal proposition, race-neutral, the trial court must decide whether the rationale is as a matter of fact pretextual, i.e., "whether the defendant has carried his burden of proving purposeful discrimination."[6] The opinion of the court puts the matter this way:

> If the government's explanation, generally applied, would have a disparate impact on a particular racial group, this fact should cause a trial judge to exercise special scrutiny during the third step of the *Batson* process to determine whether intentional discrimination, as a matter of fact, underlies the government's peremptory challenge. Indeed, a trial judge may be justified in concluding at that stage that discriminatory intent has played a role in the challenge when the disparate impact is great and any legitimate concern of the prosecutor slight. But the role of disparate impact in the *Batson* analysis is as circumstantial evidence of discriminatory intent at the third stage and not as a controlling legal factor at the second.

Typescript at 9-10.

The court is correct in saying that, when "the government's explanation, generally applied, would have a disparate impact on a particular racial group, this fact should cause a trial judge to exercise special scrutiny . . . to determine whether intentional discrimination, as a matter of fact, underlies the government's peremptory challenge." And the court is equally correct in noting that the trial judge would be warranted in drawing an inference of discriminatory intent "when the disparate impact is great and any legitimate concern of the prosecutor slight." My disagreement with the court is that, having laid out the appropriate analytic scheme, it does not apply that scheme to the case at bar. A reading of the trial transcript does not suggest that the disparate impact on blacks which the Repetto explanation apparently entails led the trial judge to undertake any "special scrutiny," let alone to weigh the

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6. *Hernandez*, 111 S. Ct. at 1866.

gravity of the probable disparate impact against the substantiality of "any legitimate concern of the prosecutor." The trial judge said (1) that he was "going to accept the government's explanation;" (2) that "[o]ther reasons [additional to the Tannenbaum postal-worker explanation] were given;" (3) that "[t]he record will speak for itself;" (4) that "Juror No. 4 is black and has not been challenged;" (5) that the government's quasi-"policy" with respect to postal workers "was expanded upon by Mr. Repetto;" and (6) that the "[m]otion [was] denied."[7]

There is, of course, no reason to be surprised that the trial judge did not engage in the "special scrutiny," and attendant balancing, called for in today's opinion for the court. Prior to today, this court had not articulated a "special scrutiny" standard. And, more to the point, at voir dire, defense counsel did not undertake to buttress his objection to the government's peremptory challenge of Ms. Lucas with any information or even any argument on what

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7. This court's exposition, in the closing paragraph of its opinion, of why the district court's ruling is to be affirmed, does not suggest that my colleagues in the majority read the trial transcript with significantly greater breadth than I do:

> We find credible record evidence that logically supports the district court's determination that the government had no intent to discriminate against black jurors. As we have indicated, prosecutor Repetto tendered to the district court a racially neutral explanation that was plausible. Moreover, as the trial judge noted at the time, this explanation was buttressed by the fact that the government had earlier had repeated opportunity to challenge the black juror who in fact served on Mr. Uwaezhoke's jury, and declined to do so. We acknowledge that Repetto's explanation would have been more credible if the government's far less plausible alternative explanation had not been advanced. We also acknowledge that Repetto's explanation, if generally applied, would be likely to have a disparate impact on blacks in the vicinage and, accordingly, is one that should be scrutinized with care. We are unwilling to hold, however, that these facts, singly or together, required the district court to reject Repetto's explanation. The trial judge was far better situated than we to determine whether that explanation was fact or pretext. He concluded that it was fact, and we cannot fault him for doing so.

Typescript at 12-13.

the implications of the Repetto explanation would be if generally followed in the selection of juries in drug cases in the Newark federal courthouse.[8] I do not, therefore, fault the trial judge for not carrying out a task whose contours had not been prescribed and the tools for which had not been supplied to him. Under these circumstances, I think the proper course is to remand this case in order to accord the trial judge the opportunity to conduct the inquiry and make the determination called for by this court's opinion.

C.

For the reasons given, I am of the view that this case should be remanded to the district court for a reexamination of both of the explanations for striking Ms. Lucas – the postal-worker explanation and the "it's a person that may be involved in a drug situation where she lives" explanation – vouchsafed by the government at voir dire.

I would surmise that in the event of such a remand the government would elect not to pursue the proposition that postal workers as a class – a class that numbers some 730,000 nationwide, *U.S. Postal Service Work Force Profile* (Aug. 21, 1992) – are generically not to be trusted to try federal drug cases. That would leave the more serious question: in a city which is 58.5% black, is the exclusion from jury service in drug cases (which appear to constitute

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8. Even in defendant's brief on appeal no attempt has been made to present data bearing on the question whether the exclusion from jury service of low-income Newark residents would be likely to skew the racial composition of the resultant juries. Similarly, defendant's brief does not address the likely impact of excluding postal workers. Presumably because defendant's brief is silent on these matters, the government's brief is likewise silent. Given this information gap, I have found it necessary, in preparing this opinion, to make substantial demands on the time of the staff of the William H. Hastie Library of the United States Court of Appeals for the Third Circuit – the staff which is so capably led by Susan B. English, Circuit Librarian; for the cheerful and resourceful assistance provided by Ms. English and her colleagues – most particularly, Karen L. Richardson, Assistant Librarian for Research – I am very grateful.

the largest category of federal felony prosecutions[9]) of all persons who live in a "low-income area" compatible with *Batson*?

A very similar question recently confronted the Ninth Circuit in *United States v. Bishop*, 959 F.2d 820 (9th Cir. 1992). There, in the course of selecting a jury to try a black defendant charged with drug-trafficking and assaulting a federal officer, the government exercised a peremptory challenge to strike Ms. Burr, a black eligibility worker who lived in the Compton area of south-central Los Angeles. In justifying the challenge government counsel:

> stated that he felt that an eligibility worker in Compton is likely to take the side of those who are having a tough time, aren't upper middle class, and probably believes that police in Compton in South Central L.A. pick on black people.
>
> To some extent the rules of the game down there are probably different than they are in upper middle class communities. And they probably see police activity, which is, on the whole, more intrusive than you see in communities that are not so poor and violent.

Id. at 822.

Defense counsel was unpersuaded: "Specifically, in view of the fact that approximately three quarters of Compton's population is black, he argued that residence in this case served as a mere surrogate for race." *Id.* The district court

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9. I have not been able to locate an exact, and current, statistical breakdown of federal felony cases. But reasonable inferences can be drawn from other data: In 1989, district courts sentenced 27,377 persons to prison terms; of those persons, 13,306 had been convicted of drug and drug-related offenses. Timothy J. Flanagan and Kathleen Maguire, eds. *Sourcebook of Criminal Justice Statistics 1991*, U. S. Dept. of Justice Bureau of Justice Statistics (1992) 505 Table 5.20. In the district courts of the Third Circuit, in the twelve-month period from October 1, 1990 to September 30, 1991, drug cases constituted 21% of the total criminal filings; for the District of New Jersey, the figure was 15%. In the twelve-month period from October 1, 1991 to September 30, 1992, the Circuit-wide figure was 23%, and the figure for the District of New Jersey was 14%. *United States Courts of the Third Circuit: 1992 Annual Report* (1993) 89.

rejected the *Batson* claim. But the Ninth Circuit took a different view:

> ...[T]he proffered reasons (that people from Compton are likely to be hostile to the police because they have witnessed police activity and are inured to violence) are generic reasons, group-based presuppositions applicable in all criminal trials to residents of poor, predominantly black neighborhoods. They amounted to little more than the assumption that one who lives in an area heavily populated by poor black people could not fairly try a black defendant.

Id. at 825. Concluding that the government's reasons were not race-neutral, the Ninth Circuit reversed.

I agree with the Ninth Circuit that the peremptory challenge at issue in *Bishop* was fraught with constitutional risk: "the invocation of residence both reflected and conveyed deeply pernicious stereotypes." *Id.* I would not, however, have followed the analytic path taken by the Ninth Circuit. In my view, the government's explanations in *Bishop*, like the explanations tendered by the government in the case at bar, were, as unadorned verbal propositions, race-neutral; the question that should have been examined there, and that, in my judgment, should, via remand, be reexamined here, with the "special scrutiny" called for in today's opinion for the court, is whether, considered in context, the tendered explanations were pretextual.

The issues posed in cases such as *Bishop* and the case at bar go to the core of *Batson* and hence are of great importance to the due administration of equal justice under law. The reason this is so was stated clearly for this court by Judge Higginbotham on March 5, 1993, the last day of his twenty-nine years of distinguished judicial service:

> ...[I]f tension exists between the "old tradition" of unconsidered preference for unfettered use of peremptory challenges and the still relatively "young tradition" of meaningful safeguards against invidious application of racial stereotypes, then the latter consideration must prevail. If the former consideration still prevailed, the "price" would be the jeopardizing of the integrity of the judicial process and the

> stigmatization of venirepersons of color. And such a price would be "too high." [*Georgia v. McCollum*, 112 S. Ct. 2438, 2458 (1992)] (citing *Edmonson v. Leesville Concrete Co., Inc.*, 111 S. Ct. 1077, 2088, 114 L.Ed.2d 660 (1991)).

Jones v. Ryan (3d Cir. No. 91-1821, March 5, 1993) slip op. at 17-18.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

NDUCHE CHIMA UWAEZHOKE, AKA ANDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the prosecutor provided a racially neutral, non-pretextual explanation for exercising a peremptory challenge against a black prospective juror.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Batson v. *Kentucky*, 476 U.S. 79 (1986)	7, 8, 9, 10, 11
Hernandez v. *New York*, 111 S. Ct. 1859 (1991)	7, 8, 9, 10, 11
United States v. *Alvarado*, 951 F.2d 22 (2d Cir. 1991)	10
United States v. *Bentley-Smith*, 2 F.3d 1368 (5th Cir. 1993)	9
United States v. *Bishop*, 959 F.2d 820 (9th Cir. 1992)	10, 11
United States v. *Clemons*, 941 F.2d 321 (5th Cir. 1991)	8, 9
United States v. *Dawn*, 897 F.2d 1444 (8th Cir.), cert. denied, 498 U.S. 960 (1990)	9
United States v. *Grandison*, 885 F.2d 143 (4th Cir. 1989)	10
United States v. *Joe*, 928 F.2d 99 (4th Cir.), cert. denied, 112 S. Ct. 71 (1991)	10
United States v. *Mitchell*, 886 F.2d 667 (4th Cir. 1989)	9
United States v. *Mixon*, 977 F.2d 921 (5th Cir. 1992)	10
United States v. *Moreno*, 878 F.2d 817 (5th Cir.), cert. denied, 493 U.S. 979 (1990)	9
United States v. *Nichols*, 937 F.2d 1257 (7th Cir.), cert. denied, 112 S. Ct. 989 (1992)	8, 10
United States v. *Pofahl*, 990 F.2d 1456 (5th Cir. 1993)	8
United States v. *Prine*, 909 F.2d 1109 (8th Cir.), cert. denied, 111 S. Ct. 1318 (1991)	8-9
United States v. *Romero-Reyna*, 889 F.2d 559 (5th Cir.), cert. denied, 494 U.S. 1084 (1990)	9
United States v. *Williams*, 934 F.2d 847 (7th Cir. 1991)	8, 9

Constitution and statutes:

	Page
U.S. Const. Amend. XIV (Equal Protection Clause)	7
21 U.S.C. 841(a)(1)	2
21 U.S.C. 846	2
21 U.S.C. 960	2
21 U.S.C. 963	2

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No. 93-571

NDUCHE CHIMA UWAEZHOKE, AKA ANDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. Supp. App. 1-32) is reported at 995 F.2d 388.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on May 6, 1993. A petition for rehearing was denied on June 11, 1993. Pet. App. 3a-4a. The petition for a writ of certiorari was not filed until October 6, 1993, and it is therefore substantially out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiring to import heroin and to possess heroin with intent to distribute it (21 U.S.C. 963 and 846), importing heroin (21 U.S.C. 960), and possessing heroin with intent to distribute it (21 U.S.C. 841(a)(1)). Petitioner was sentenced to 216 months' imprisonment. The court of appeals affirmed. Pet. Supp. App. 1-32.

1. The evidence, which is summarized in the government's brief in the court of appeals, showed that co-defendant Tony Butts was arrested by federal officers at Newark International Airport while carrying a false-bottom suitcase containing heroin that Butts had imported from Japan.[1] Agreeing to cooperate, Butts identified petitioner as the intended recipient of the heroin and made a series of telephone calls to arrange a controlled delivery of the heroin to petitioner at a Chicago airport. Petitioner was subsequently arrested when he took possession of the suitcase. In a later warrant-authorized search of petitioner's apartment, officers found a second false-bottomed suitcase, assorted drug paraphernalia, $50,000 in cash, and an automatic pistol. Trained dogs alerted to the presence of drug residue on both the suitcase and the cash found in petitioner's apartment. Gov't C.A. Br. 2, 5-6.

2. During jury selection, the government used its first peremptory strike to remove a white prospective

[1] Butts pleaded guilty to a substantive importation count and testified against petitioner at trial.

juror. C.A. Supp. App. 44-45; Gov't C.A. Br. 3.[2] After defense counsel exercised a peremptory challenge during the fifth round of strikes, prospective juror Kim Lucas, a black woman, was called as a replacement juror. During her *voir dire* examination, juror Lucas stated that she had been a postal worker for four years; that she was an unmarried, single parent of two small children; that she rented her place of residence;[3] that she was a high school graduate who was attending college; and that her interests included aerobics, cutting hair, and tennis. C.A. Supp. App. 52; Gov't C.A. Br. 3. The government then used its second peremptory challenge to remove Lucas from the panel. C.A. Supp. App. 52.

Defense counsel objected, asserting that "this is obviously racial. People sat in that seat time and again. Everyone was approved. The moment a black sits down there is a targeted thrust at that particular person." C.A. Supp. App. 53. When the court inquired as to the basis for the government's challenge, the following exchange occurred (C.A. Supp. App. 53-54):

> MR. TANNENBAUM: We challenged her because it's a general policy. She was a postal employee, and we usually just generally don't like to have postal employees on the jury. It

[2] "C.A. Supp. App." refers to the supplemental appendix that accompanied the government's brief in the court of appeals.

[3] The roster of prospective jurors showed that Lucas lived in Newark.

has nothing to do with any racial—

[DEFENSE COUNSEL]: Judge, I've tried cases in this courthouse for a long time. If that is a new policy to challenge postal authorities, that is a brand new policy.

* * * * *

THE COURT: Are you stating?

MR. REPETTO: It's not a policy.

MR. TANNENBAUM: No, it's not a policy per se.

* * * * *

THE COURT: I want to know why you challenged this particular juror.

MR. REPETTO: This particular juror is employed by the Postal Service. There is a problem with Postal Service jurors in these kinds of cases. It is a person [who] is a single parent, it's also a person that rents, it's a person that may be involved in a drug situation where she lives.

There is a lot going to this other than the fact that she

> is black, and there is a black juror on [the panel] that nobody touched.

The court accepted the government's explanation for its challenge of juror Lucas. C.A. Supp. App. 54. In so doing, the court noted "that Juror No. 4 [Paul Ferguson] is black and has not been challenged throughout." C.A. Supp. App. 55. Jury selection was completed without any further challenges by the government, and juror Ferguson served on the jury empaneled for petitioner's trial.

3. The court of appeals affirmed petitioner's conviction, with one judge dissenting. Without deciding whether the government's use of a peremptory challenge to strike a single black juror constituted *prima facie* evidence of a racially discriminatory purpose (Pet. Supp. App. 7-8),[4] the court held that the explanation offered by prosecutor Repetto for the government's challenge of juror Lucas was "valid" as it was "clearly race-neutral on its face." Pet. Supp. App. 10, 12. As the court of appeals explained (Pet. Supp. App. 10):

> The prosecutors, at the time they exercised the peremptory challenge, knew that Ms. Lucas was a single parent of two children who was making the salary of a postal worker with four years of seniority and renting an apartment in Newark, New Jersey. It is, we believe, fair to infer that the

[4] As the court of appeals stated, the threshold issue as to whether a *prima facie* showing of discriminatory motivation was made became moot once the prosecutors offered an explanation for their exercise of the peremptory strike. Pet. Supp. App. 7-8.

> prosecutors, in the absence of any more detailed information concerning Ms. Lucas, speculated that she might live in low income housing in Newark. Having so speculated, the prosecutors inferred that Ms. Lucas was more likely to have had direct exposure to drug trafficking than someone who did not live in low-income housing in Newark. While this conclusion may or may not be empirically correct, we cannot say that it exhibits racially discriminatory intent as a matter of law.

The court of appeals further found "credible record evidence that logically support[ed]" the conclusion that the explanation offered by the government was not pretextual. Pet. Supp. App. 12. Thus, the court of appeals noted, prosecutor Repetto's tender of "a racially neutral explanation that was plausible * * * was buttressed by the fact that the government had earlier had repeated opportunity to challenge the black juror who in fact served on [petitioner's] jury, and declined to do so." *Ibid.*

District Judge Pollak, sitting by designation, dissented. In Judge Pollak's view, "the postal-worker explanation [was] deficient as a matter of law," Pet. Supp. App. 17, but the record was unclear as to whether the district court relied on that explanation to any extent in denying petitioner's *Batson* claim. Pet. Supp. App. 17, 22-23. Judge Pollak further stated that in his view the explanation pertaining to juror Lucas's residence in a high-crime area, albeit racially neutral on its face, would have a disparate impact on minority jurors in practice. Pet. Supp. App. 24-26. As such, Judge Pollak believed that the case should have been remanded so that the district court could reex-

amine the reasons proffered by the government for challenging juror Lucas. Pet. Supp. App. 29.

ARGUMENT

Petitioner contends that the courts below erred in finding that the prosecutors offered a racially neutral, non-pretextual explanation to justify their exercise of a peremptory challenge to remove prospective juror Lucas from the jury panel.

This Court held in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), that the Equal Protection Clause bars a prosecutor from exercising peremptory challenges based on race. The Court also formulated a three-part evidentiary standard for establishing the existence of racial discrimination in the use of a peremptory challenge: the defendant must make a *prima facie* showing that the prosecutor's peremptory challenge was based on race, 476 U.S. at 96-97; if the defendant makes that showing, the burden shifts to the prosecutor to provide a race-neutral reason for the challenge, *id.* at 97-98; and the trial court "then will have the duty to determine if the defendant has established purposeful discrimination," *id.* at 98. The trial court's determination of that issue is entitled to "great deference" by a reviewing court, *id.* at 98 n.21, and may be reversed only if it is "clearly erroneous." *Hernandez* v. *New York*, 111 S. Ct. 1859, 1869 (1991).

Batson requires only that a peremptory strike not be based on race; "the reason offered by the prosecutor for a peremptory strike need not rise to the level of a challenge for cause." *Hernandez*, 111 S. Ct. at 1868 (plurality opinion). See also *Batson*, 476 U.S. at 97 ("emphasiz[ing] that the prosecutor's explanation need not rise to the level justifying exercise of a

challenge for cause"). Thus, as was explained in *Hernandez*, 111 S. Ct. at 1866 (plurality opinion), "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."

In this case, the prosecutors' reasons for their peremptory strike of prospective juror Lucas, as elaborated upon by prosecutor Repetto, were clear, specific, and racially neutral, as *Batson* requires. See 476 U.S. at 98 & n.20. Thus, in enlarging on prosecutor Tannenbaum's statement that there was an informal "policy" of generally excluding postal employees from the jury, prosecutor Repetto stated that postal employees posed a "problem * * * in these kinds of cases," and that, as a single parent who resided in a rental unit in Newark, Lucas constituted "a person that may be involved in a drug situation where she lives." C.A. Supp. App. 53-54.

Courts of appeals have upheld the adequacy of similar explanations that focus on a prospective juror's youth, marital and parental status, economic circumstances, or other demographic circumstances that might engender a more sympathetic attitude toward the accused. See, *e.g.*, *United States* v. *Pofahl*, 990 F.2d 1456, 1465-1466 (5th Cir. 1993) (low wage earners); *United States* v. *Clemons*, 941 F.2d 321, 325 (5th Cir. 1991) (age); *United States* v. *Nichols*, 937 F.2d 1257, 1263-1264 (7th Cir.) (young, single mothers), cert. denied, 112 S. Ct. 989 (1992); *United States* v. *Williams*, 934 F.2d 847, 849-850 (7th Cir. 1991) (young, single mother); *United States* v. *Prine*, 909 F.2d 1109, 1113 (8th Cir.) (young, unmarried persons who might be more likely to live in a social environment with a liberal attitude toward drugs), cert. denied, 111 S. Ct.

1318 (1991); *United States* v. *Dawn*, 897 F.2d 1444, 1448 (8th Cir.), cert. denied, 498 U.S. 960 (1990) (youth); *United States* v. *Mitchell*, 886 F.2d 667, 671-672 & n.2 (4th Cir. 1989) (youth); *United States* v. *Moreno*, 878 F.2d 817, 820 (5th Cir.), cert. denied, 493 U.S. 979 (1989) (young, single, unemployed); *United States* v. *Clemons*, 843 F.2d 741, 748 (3d Cir.), cert. denied, 488 U.S. 835 (1988) (young and single). Accordingly, the court of appeals was correct in observing that the collective explanation advanced by the prosecutors did not "exhibit[] racially discriminatory intent as a matter of law." Pet. Supp. App. 10.[5]

The court of appeals properly upheld the district court's finding in this case that the prosecutors' explanation for their exercise of a peremptory challenge against juror Lucas was non-pretextual and free of discriminatory purpose. The determination that a prosecutor's reasons are non-discriminatory essentially rests on a finding of credibility, an issue as to which "[t]here will seldom be much evidence," and as to which "the best evidence often will be the demeanor of the attorney who exercises the challenge." *Hernandez*, 111 S. Ct. at 1869 (plurality

[5] Although the challenge of juror Lucas was based largely on intuitive assumptions that the prosecutors drew from a combination of factors, the rule in *Batson* does not prohibit that kind of subjective judgment on the part of prosecutors. See *United States* v. *Bentley-Smith*, 2 F.3d 1368, 1374 & n.6 (5th Cir. 1993) (collecting cases); *Williams*, 934 F.2d at 850. Indeed, the prosecutors' explanation would have been facially sufficient had it focused only on the challenged juror's employment. See *United States* v. *Romero-Reyna*, 889 F.2d 559, 560-561 (5th Cir.) (prosecutor's systematic exclusion of any juror whose occupation began with the letter "P"), cert. denied, 494 U.S. 1084 (1990).

opinion). In this case, however, there was more than just the district court's assessment of the prosecutors' credibility in asserting a non-racial purpose in striking juror Lucas: there was persuasive objective evidence supporting the district court's finding that the prosecutors had no intention to discriminate on account of race when they struck Lucas. As the court of appeals pointed out, before striking Lucas the prosecutors "earlier had repeated opportunity to challenge the black juror who in fact served on [petitioner's] jury, and declined to do so." Pet. Supp. App. 12. See *United States* v. *Mixon*, 977 F.2d 921, 923 (5th Cir. 1992); *United States* v. *Alvarado*, 951 F.2d 22, 26 (2d Cir. 1991); *Nichols*, 937 F.2d at 1264; *United States* v. *Joe*, 928 F.2d 99, 103 (4th Cir.), cert. denied, 112 S. Ct. 71 (1991); *United States* v. *Grandison*, 885 F.2d 143, 148 (4th Cir. 1989). In such circumstances, there is simply no basis for the Court to second-guess the trial court's conclusion that the prosecutors' motive in challenging prospective juror Lucas was not racially motivated.

The decision below does not conflict with the holding in *United States* v. *Bishop*, 959 F.2d 820 (9th Cir. 1992). In *Bishop*, the prosecutor used a peremptory challenge to remove a minority member of the venire because she was a welfare eligibility worker who resided in a predominantly black community, in which a negative attitude toward police officers was likely prevalent. Focusing on the aspect of residency, the court of appeals held that the prosecutor's explanation was impermissible under *Batson*, since it could be used to justify the striking of any minority prospective juror who might reside in a low-income neighborhood. Citing *Hernandez*, the *Bishop* court

stated that residency could be used to justify the exercise of a peremptory challenge only "[w]here residence is utilized as a link connecting a specific juror to the facts of the case." 959 F.2d at 826. Unlike in *Bishop*, juror Lucas was not struck simply because she resided in a low-income neighborhood. Rather, the prosecutors cited Lucas's age, her status as a young, unwed mother, and her employment and economic status as suggesting that as a juror she might be less favorably inclined toward the government.[6] As we have noted, such explanations have been accepted as adequate for purposes of *Batson*, and nothing in *Bishop* challenges that proposition. Nor did the court in *Bishop* require that the government must always establish a nexus between the reason for the exercise of a peremptory challenge and the facts of the particular case on trial in order to satisfy the requirements of *Batson*. The court merely indicated that where the explanation offered touches racial or ethnic stereotyping—like the residency explanation in *Bishop* or the Spanish-speaking juror in *Hernandez*—a nexus between the reason and the facts of the case must be offered. That rationale does not extend to the explanation provided here.

[6] In *Bishop*, the prosecutor also noted the challenged juror's age and employment as a welfare eligibility worker as reasons for seeking her removal. However, the court discounted those reasons because other jurors of similar age and employment were not struck. 959 F.2d at 827. Thus, the challenge in *Bishop* was explainable only in terms of residency.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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